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No. _____

In The
# Supreme Court of the United States

October Term, 1994

DORIS BERRY,
as Personal Representative of the Estate of Lee F. Berry, Jr.,
Deceased, *Petitioner,*

v.

CITY OF DETROIT, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

*AND APPENDICES*

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## QUESTIONS PRESENTED FOR REVIEW

I.

DID THE COURT OF APPEALS FOR THE SIXTH CIRCUIT EFFECTIVELY VIOLATE PETITIONER'S SEVENTH AMENDMENT RIGHT TO TRIAL BY JURY BY REVERSING AN AWARD FOR DAMAGES AND REMANDING THIS CAUSE TO THE DISTRICT COURT FOR ENTRY OF A JUDGMENT NOTWITHSTANDING THE VERDICT, BASED UPON THE EVIDENCE BEING LEGALLY INSUFFICIENT, WHEN, IN FACT, PETITIONER PRESENTED OVERWHELMING EVIDENCE TO SUPPORT THAT VERDICT?

II.

DID THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ABUSE ITS DISCRETION BY REVERSING A JUDGMENT AND VERDICT OF A DISTRICT COURT BASED UPON ARGUMENTS NEITHER RAISED IN THE DISTRICT COURT NOR UPON APPEAL TO THE SIXTH CIRCUIT?

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## PETITION FOR WRIT OF CERTIORARI

The petitioner, DORIS BERRY, as Personal Representative of the Estate of Lee F. Berry, Jr., Deceased, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit decided and filed on June 17, 1994.

## OPINIONS BELOW

On June 17, 1994, the Sixth Circuit Court of Appeals issued an opinion reversing a jury verdict against the City of Detroit, remanding the case for entry of judgment as a matter of law in favor of the City of Detroit, per Federal Rules of Civil Procedure 50(b). The decision was recommended for full text publication and cited at 25 F.3d 1342 (6th Cir. 1994), and is appended hereto as Appendix "B." A Petition for Rehearing *en banc* was timely filed and denied on August 23, 1994. See Appendix "A."

## JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on June 17, 1994. A timely Petition for Rehearing *en banc* was filed and ultimately denied on August 23, 1994. This petition is filed within ninety days of that date as required by Rule 13.4 of the Supreme Court Rules. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS

U.S. Const. Amendment IV —

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amendment VII —

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-

examined in any Court of the United States, than according to the rules of the common law.

Title 42 U.S.C. § 1983 —

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## STATEMENT OF THE CASE

### A. PRIOR PROCEEDINGS

Doris Berry brought this action in the Federal Court for the Eastern District of Michigan as Personal Representative of the Estate of Lee Floyd Berry, Jr. against police officer Joseph Hall, the City of Detroit and Police Chief William Hart, alleging, among other things, violation of the decedent's rights under the Fourth and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983. A First Amended Complaint was subsequently filed. Plaintiff's allegations against Officer Hall included that his use of deadly force was excessive under the circumstances and that by doing so, he violated the United States Constitution and committed the state torts of assault and battery and gross negligence. As to the City of Detroit, plaintiff alleged that the City of Detroit had a policy and practice of improperly training its police officers in the use of deadly force as well as a policy and practice of failing to discipline City of Detroit policemen who improperly used deadly force. Both the City of Detroit and Officer Hall filed an answer to the complaint. Subsequently, Officer Hall filed a counterclaim against the decedent, claiming that the decedent assaulted and battered him during the incident.

Pretrial motions were filed and eventually defendant Hart was dismissed from the action. The lower court denied the City of Detroit's motion for summary judgment under the municipal liability claim, indicating "whether defendant Hall was trained in the deadly force policy or whether the policy was in any way communicated to him were genuine issues of material fact on the failure to train issue," and that "whether the defendant City's alleged failure to discipline constituted a custom or policy under *Monell* v. *Department of Social Services*, is a question of material fact."

A jury trial commenced on May 24, 1991. During plaintiff's case-in-chief, 24 witnesses were called, including Officer Hall. Defendant Hall and the City of Detroit called a total of ten witnesses in their case-in-chief, including high ranking Detroit police officials. The case was submitted to the jury on a Special Verdict Form. On June 9, 1991, the jury returned a unanimous verdict against both defendants finding them liable on all counts, including the 1983 federal civil rights claim of excessive force as to Officer Hall and the § 1983 federal civil rights claim against the City of Detroit for failing to adequately train its police officers on the use of deadly force and for failing to adequately discipline its police officers for the improper use of deadly force. The jury awarded damages in the amount of $6,000,000.

The trial court denied post-trial motions for new trial filed by Officer Hall and the City of Detroit. A judgment was entered reflecting the jury findings on September 11, 1991. Thereafter, Officer Hall and the City of Detroit filed a timely appeal with the United States Court of Appeals for the Sixth Circuit. While the case was pending on appeal, the matter involving Officer Hall was settled. The appeal continued as to the City of Detroit only.

On June 17, 1994, the appellate court reversed the jury verdict against the City of Detroit and remanded the case for an entry of judgment as a matter of law in favor of the City of Detroit pursuant to Fed.R.Civ.P. 50(b). Thereafter, the petitioner filed a timely petition for rehearing *en banc*, which petition was denied on August 23, 1994.

**B. FACTS**

On June 23, 1987, Lee Floyd Berry, Jr., age 26, was shot to death by Officer Joseph Hall after a traffic stop. The killing occurred in Mr. Berry's driveway after he was asked to exit the van he had been driving. At the scene at the time of the killing were his brother,

Dwayne Berry, age 14, and his nephew David, age 8. Officer Hall fired his revolver five times, hitting Mr. Berry twice, once in the upper back, which was the fatal wound caused by a hollow point bullet, and once in the upper right front thigh area. Mr. Berry was unarmed and was not under the influence of any drugs or alcohol.

Although there were some factual disputes, petitioner produced testimony during the trial that established that Mr. Berry had finished working at the family moving business and was driving his brother and nephew home. Both the brother and nephew testified that Mr. Berry was driving erratically and ran two red lights enroute home. However, they denied being involved in a high speed chase as was claimed by Officer Joseph Hall.

The officer initiated a traffic stop just as Mr. Berry was approaching his home at 3810 West Outer Drive in the City of Detroit. Mr. Berry pulled his van into the driveway as the officer pulled up on his motorcycle.

Mr. Berry exited the van. Before either his brother or his nephew could exit the van, they heard something to the effect "if you make another move, I'll kill you." After this statement was made, there was an apparent scuffle on the side of the van. Neither the brother nor the nephew could see what occurred on the side of the van since there were no windows on that side except for the driver's side window. Dwayne, the decedent's brother, then saw the officer draw his weapon, extend his arm and fire. At the time of the shooting, Dwayne could not see where his brother was. He testified that approximately four to five shots were fired.

Victor Thompson and his wife Vera lived next door to the Berrys at 3800 West Outer Drive, and were home at the time of the shooting. Just before the shooting Mr. Thompson was standing outside in his driveway. He did not hear anything that sounded like a police siren (refuting the officer's contention that a police chase preceded the traffic stop). Mr. Thompson heard three loud shots. Then he saw Frank Leake, who had been working at the Berry home in the backyard, coming around the Berry's house and in a very excited and upset manner, indicated, "Oh my God, the guy has shot the guy in cold blood." Mr. Thompson then went over to investigate what had happened and saw the police officer standing, and not appearing to be injured to him in any way.

Frank Leake, a retired employee of Rockwell Standard, did odd jobs for the Berrys. He had been working with his grandson, Timothy Leake, putting up a fence in the backyard when he heard the van pull up in the driveway. Prior to that he had not heard anything that sounded like a police siren. After the van had pulled into the driveway, he heard someone yelling, "Get out of that van, you mother fucker! Get out of the van, you mother fucker!" He heard the shots fired and saw Mr. Berry slumped over. He ran around the house where he came in contact with Mr. Thompson and said to him, "Oh, they shot this man down in cold blood."

Officer Joseph Hall was called by the plaintiff as an adverse witness. He testified that he had received formal training on the use of fatal force and updates at roll call. In addition, he testified that once a year for nineteen years he received in-class training on the use of deadly force in the course of firearm's qualification at the Detroit Police Range. However, plaintiff's Exhibit 156 (his range card) reflected that he had not qualified with a firearm since 1984, and was not qualified with the firearm that he used to kill the plaintiff/decedent, a .45 caliber Smith & Wesson revolver.

Plaintiff's Exhibit 16, the bullet taken from the upper back of Mr. Berry, was a hollow point bullet. Officer Hall referred to this bullet as his "get off me bullet." The bullet was prohibited ammunition in the Detroit Police Department. Officer Hall indicated he would hide the bullet from his superiors during inspections. "I would put it in my pocket, yes." Although plaintiff's Exhibit 160 (Detroit Police Procedures and Regulations Regarding Sidearms) required supervisory officers to conduct monthly inspections to determine if officers were carrying department approved ammunition, Officer Hall indicated he was not aware of any Detroit police officer ever being disciplined for using improper ammunition in his sidearm.

On the day of the fatal encounter, Officer Hall described seeing a white van going eastbound on Seven Mile Road at a rate of 60-70 m.p.h., in a 30 m.p.h. zone, driving on the wrong side of the road. Officer Hall then described a wild, highspeed police chase, travelling at speeds of 70-80 m.p.h.

Hall claimed he activated his lights and siren when he first saw the van. According to Officer Hall he pulled in behind the van in the driveway of 3810 West Outer Drive, drew his revolver, and started to

approach the man who was outside the van, whom he recognized to be the driver. He denied that any words were exchanged between him and the decedent.

Officer Hall testified that his official report indicated exactly what happened. The report reflected that he went up to the driveway where Mr. Berry had his back towards him. Officer Hall then went to holster his weapon to get his cuffs in order to place Mr. Berry under arrest. According to the report and Mr. Hall's testimony, as he was doing this Mr. Berry turned quickly, caught him by surprise and started to hit him in the face and body a number of times. He struck Mr. Berry on the top of his head. Mr. Berry then responded by shattering his shatterproof plastic lenses with his bare fist, a blow which, according to Officer Hall, knocked him to the ground. After he was knocked down, he could not see because there was blood in both of his eyes. Officer Hall further described the situation in his official report:

> As I fell to the ground by the side of the van — the perp wrestled with me and grabbed my above-described weapon with both of his hands — and tried to wrestle the gun away from me. His hands were over mine and applying pressure. During the struggle for my gun the weapon discharged four times, striking the perp. The perp was continuing to pull on my gun as it was discharging. The perp stopped pulling, and I was able to free myself and my gun from him.

According to Officer Hall, Mr. Berry in effect shot himself.

During his trial testimony Officer Hall indicated that he pushed Mr. Berry away and kept firing. He was asked why, if he was able to push Mr. Berry away, did he continue firing, and he responded, "Sir, the gun was on automatic, and that it wasn't until I got all the way around here — Mr. Berry had attacked me twice. Mr. Berry had attacked me twice." At this point, Officer Hall was provided the weapon and asked to demonstrate how a .45 caliber Smith & Wesson revolver functions on automatic. He responded, "It's kind of set right now ... (demonstrating) ... it's automatic ... I'm pulling it, coming up just like this — get off me — I'm doing it, yes, sir, get off me."

In conclusion Officer Hall indicated that he had received no suspension or any type of disciplinary action as a result of what

occurred on June 23, 1987. Even though he had been assigned to the Board of Review per department procedure, he never spoke to nor received any letters from the Board. His attorney apparently handled the entire matter.

Dr. Ian Clark Hood was the medical examiner who performed the autopsy on Lee Floyd Berry, Jr. on June 24, 1987. He found that Mr. Berry was 5'7" tall and weighed approximately 137 pounds. His blood contained no drugs or alcohol. He found that Mr. Berry had sustained a blow just behind and below the left ear, which left two small scratches and skin damage. That blow could have been made by a blunt object like a hand-gun; it was not made by something soft or padded such as a fist.

Dr. Hood further testified that Mr. Berry had sustained two gunshot wounds, the most significant of which entered his right central upper back. The path of the bullet completely severed the spinal cord and would have rendered Mr. Berry completely paralyzed, limp from about the level of the lower ribs down. That bullet went through the aorta, the left main stem bronchus, going into the left lung, the left pulmonary vein, the heart and would have caused a tremendous amount of blood loss. The bullet that caused this damage was a .45 caliber jacketed hollow point bullet. This wound was fatal. The second gunshot wound entered the front inner upper right thigh a few inches below the groin. It passed backwards and went slightly downwards and shattered the right femur. Most people who receive such a wound while standing up would have been immediately knocked to the ground and their leg would have been rendered useless to them. Had this been the only wound, Mr. Berry, with adequate resuscitation and management of the fracture, would have been able to return to a near normal existence.

Dr. Hood examined Mr. Berry's body and clothing for evidence of soot or gun powder to determine whether the shooting was a close range firing. He found no evidence of soot or gun powder on either the body of the deceased or the clothing. The medical examiner testified that in his opinion the gun would have been at least two feet or farther away when it was discharged. When he reviewed the gunshot distance determination report submitted by the firearms examiner,

Bernell Fair, he was in agreement with Mr. Fair's conclusions that the muzzle-to-garment distance would have to have been four feet or greater or else he would have expected to see some deposition of gun powder on the bullet hole to Mr. Berry's back. He also stated that, regardless of the fact that there was a deposit of antimony and barium chemicals, chemicals which come from the primer in the bullet and which are not gun powder, that did not change his mind as to his agreement with the gunshot distance determination findings of Bernell Fair since Mr. Berry could have gotten the deposit of antimony and barium on his hands if he was within several feet of the weapon when the weapon was fired.

Dr. Hood also testified that Officer Hall's claim that he fired the weapon as Mr. Berry tried to wrestle it from him was physically impossible for a variety of reasons. Mr. Berry could not have been hanging on to the gun when it was fired since he was shot in the back. The doctor would also have expected to find gun powder deposits and gun powder residue on Mr. Berry's hands and arms if he had been hanging on to the weapon when the gun had been fired. Finally, whether the first shot was to the back or to the thigh, at a very minimum, Mr. Berry would have been on his way down the second time he got shot.

Sgt. Bernell Fair, a Detroit Police Department firearm's expert, examined the weapon used and test fired it in the laboratory. He identified the .45 caliber hollow point bullet that was fired into the back of Mr. Berry as being fired from Officer Hall's .45 caliber Smith & Wesson revolver. The hollow point bullet has more stopping power and creates more damage. In addition, Sgt. Fair performed gunshot distance determination testing, which is a testing procedure used to determine the muzzle-to-garment distance when the gun is fired. Sgt. Fair had microscopically analyzed the clothing of Mr. Berry and found no gun powder on any of his clothing. Sgt. Fair's opinion was that when the weapon was discharged, causing the wound to the back, the minimum distance was four feet or greater. Furthermore, the distance could have been six feet or farther since the testing at six feet still did not leave evidence of gun powder residue.

Hayden Dannug, a forensic chemist with the Detroit Police Department Crime Laboratory, testified that he microscopically examined swabs taken from the hands of the decedent and his clothing and found no gun powder particles. He concluded in his report that a gun

had been fired "from a short distance to the subject — to the subject's hands." A short distance can be anything from right next to the target up to as far away as ten feet. Although he could not answer the question during the trial as to whether one would have expected to find gun powder particles or residue on either the shirt or hands of a person who was holding on to the weapon when it was fired in his direction, his recollection was refreshed with his deposition, in which he indicated that under such a scenario, he would have expected to have found gun powder particles all over his shirt, sleeves and hands.

Frederick Postill is a consultant who works in the area of police, corrections and security operations. It is important to note that petitioner's brief on appeal did not delve into any of Mr. Postill's qualifications as an expert witness since that issue was not raised by the City of Detroit in post-trial motions or on appeal. In fact, although the City of Detroit raised on appeal questions regarding the bases of Mr. Postill's opinions, it never raised on appeal the argument that Mr. Postill was not qualified to render the opinions that he in fact provided at trial.

Mr. Postill was qualified as an expert on police practices and procedures. The basis for this determination was his testimony as to his qualifications, which covers approximately thirty-three pages of the trial transcript. During that testimony, he verified that he was a former deputy sheriff who was eventually elected as the Sheriff for Washtenaw County, Michigan. While acting in that capacity, he received on the job firearms training and was eventually rated as expert in the use of firearms. He is the owner of Criminal Justice Consultants, Incorporated, which was incorporated in 1976, consulting with police, corrections and security operations as well as providing training to those operations. His educational background includes a Bachelor's degree in Sociology, a Master's degree in education, and he is two-thirds of the way toward completing his doctoral degree at Michigan State University School of Criminal Justice.

His teaching experience includes four years at Washtenaw Community College as an instructor in criminal justice programs, two years with Nova University in its criminal justice master's degree program, and full-time assistant professor at the School of Criminal Justice with Michigan State University.

Although he received no police academy training, Mr. Postill has between 800-1,000 hours of formal, in-class police training. He was employed by the United States Department of Justice as a consultant for four years, training sheriffs and managers of large sheriff's departments throughout the country. During this tenure, his program trained over 1,000 individuals. He has been certified by the State of Michigan Law Enforcement Training Counsel as an instructor in police field procedures. He has also been certified to teach in many other aspects of police work.

Mr. Postill testified regarding his background in managing police systems and the specific management duties of police systems, including duties involving hiring, training, supervision and discipline. He has been on-site at 20-25 different police departments throughout the country and elsewhere reviewing their operational procedures. Postill has provided opinion testimony on police policies and practices throughout the country approximately two hundred times, and has been qualified as an expert in court on appropriate police policies and procedures approximately thirty times. He has been qualified as an expert witness not only in the United States, but also in Canada and Australia. He has specifically testified regarding the use of force by police officers where he has rendered opinion testimony approximately one hundred times.

Prior to trial, Postill conducted a review of various Detroit Police Department data which included review of shots-fired reports. This is a form which is generated every time an officer discharges his weapon, whether he is on or off-duty, answering why the gun was fired, the reason the gun was fired, what the effect of the firing of the weapon was, whether anyone was injured and overall describing in detail the circumstances surrounding the shooting. He also reviewed twenty-five personnel actions that were processed by the City of Detroit Police Department in regard to shooting incidences which occurred during the period 1982 through 1987. He also reviewed records regarding shooting incidences for the period 1983 through 1987.

In Mr. Postill's opinion, a police officer should qualify, at a minimum, on an annual basis with a firearm. He found that during the years 1985, 1986 and 1987, Officer Hall did not qualify with a firearm. In addition, Officer Hall did not receive any formal training after 1984. Mr. Postill pointed out that in March of 1985, the United States

Supreme Court made a specific ruling with regard to the use of deadly force in *Tennessee* v. *Garner*, 471 U.S. 1; 105 S.Ct. 1694; 85 L.Ed.2d 1 (1985). This ruling was a significant change in the use of deadly force, and the Detroit Police Department did not update their policy to comply with *Garner* until June, 1986, fifteen months after the decision was rendered.

Between 1982 and 1987, the Detroit Police statistics, as reflected in Exhibit 161, showed that there were 636 shootings involving Detroit police officers. These records further verified that 1,538 rounds were fired during these shootings. The average distance between the shooter and the opponent in these shootings was determined by the City's own records as being between 30-35 feet. Of these 636 shootings, 502 were classified as appropriate shootings under a self-defense theory; 113 were classified as accidental shootings. Eighty-three of the accidental shootings involved on-duty officers, with the remainder involving off-duty officers. For the year 1987 alone, there were 103 shootings, 28 of which were classified as accidental. Six persons were shot to death in 1987 by Detroit police officers and 25 persons were wounded. The evidence at trial presented the Department's own statistics for each of these years.

Mr. Postill specifically reviewed detailed records of 187 of the 636 cases. Out of the 187 cases, the files on 26 of them were not complete enough for him to formulate an opinion. The remaining 161 cases included forty situations in which there were accidental shootings. Of the forty, at least twenty of them he believed were careless or reckless use of firearms. Of the remaining cases, he classified 78 of them as unjustifiable under existing law and the Detroit City policy.

Out of the 636 shootings, 277 included shootings at burglars. Mr. Postill opined that shooting at a burglar leaving the scene of a burglary would be improper under any circumstances under the law after *Garner*, and would have been improper prior to *Garner* under the Detroit policy, which required that officers exhaust all reasonable means before they shoot at a burglar.

Out of the 161 cases, in which he found 78 to be unjustifiable shootings, he found that no significant discipline had been meted out. He gave one example after another in which there was a clear, unjustifiable use of a firearm where no discipline was imposed. Some of these examples included: On a high school graduation night in

1987, in a MacDonald's restaurant parking lot, an officer had a confrontation with a suspect and the officer was wounded. As the suspect fled into a crowd, the officer drew his weapon and fired into the crowd, killing an innocent bystander. That officer was not disciplined. An unarmed burglary suspect was shot to death when he was 25 feet away from the police officer and was a threat to no one. The officer was not disciplined. An off-duty police officer was demonstrating to her aunt the single action capability of a weapon, the firearm discharged, shooting her son. Although discipline was recommended, she was cleared by the Chief of Police and no discipline was meted out. Another off-duty officer observed a person on the roof of his house. He pulled his revolver and started to fire at the unarmed individual. No discipline was meted out. Another police officer barricaded himself in a police garage and started firing a shotgun. No one was harmed. No discipline was meted out. Two police officers came into contact with one another while off-duty during a traffic altercation. One of the officers pulled his weapon and fired a shot. No discipline. An off-duty police officer was upset by a neighbor who was playing loud music. He fired several shots from his .9mm to scare the neighbor. He was given a five day suspension, which was held in abeyance, having the effect of no discipline whatsoever.

Mr. Postill testified that the Detroit Police Department tolerates the reckless use of firearms. He stated that "They either get no discipline or a slap on the wrist" when he referred to the improper use of firearms. He indicated there are national minimum standards of training, accepted throughout the country, with regard to what is appropriate training for police officers. They include forty hour annual up-date training, including firearms training.

It was his opinion that the City's failure to direct, train and discipline their officers in the proper use of deadly force constituted a pattern of gross negligence. During the years 1983 through 1987, three police officers were shot in the line of duty; two by other officers. Thirty-Seven persons were killed and 126 were wounded by Detroit police officers during this five year time span. He felt that if you have a pattern or practice of failing to properly supervise, train and discipline officers with regard to the use of deadly force, it sends a particular message that the department tacitly approves of officers not complying with written departmental policy. He testified

that well trained, well supervised officers would not be involved in the situations that he found in the 78 cases of unjustifiable shootings.

He provided testimony regarding the use of force continuum or scale, which is a training module that appropriately sets forth how an officer should respond to a specific physical confrontation. Number one on the scale is the mere presence of the officer at the scene. Second on the scale is the verbal commands by an officer, and the scale proceeds onward to a level six, which is the highest on the scale and involves the use of deadly force. Here he pointed out that Officer Hall weighed 240 pounds and was 5'11" and was in full motorcycle gear when he came in contact with Mr. Berry, who weighed 137 pounds and stood 5'7½" tall.

He believed that the officer's written version of the offense was not physically possible. He testified that Officer Hall's testimony that the gun went into "automatic" is also not possible. The gun is a semi-automatic revolver which requires in excess of thirteen pounds trigger pull in order to fire. Finally, he testified that the officer was not justified in the use of deadly force in this incident.

To further show a pattern the City failing to discipline, the plaintiff called George W. Merritt, who was a commander with the Detroit Police Department and one of the executives appointed to the Board of Review in the underlying matter. A Board of Review is a group of three executives appointed by the Executive Deputy Chief to go over all shootings by police officers. Plaintiff's Exhibit 216 included the specific general procedures of the Board of Review, which required that the Board ensure an impartial, objective and complete investigation be conducted in each case and recommend appropriate disciplinary action to the Chief of Police. In addition, the Board has power to subpoena witnesses to their offices. Any officer involved in a shooting is automatically assigned to the Board of Review. Merritt and two other executives were assigned to determine the facts in the underlying matter. Mr. Merritt had been deposed within thirteen months from the date of the underlying incident. When he was deposed he had no idea who Joseph Hall was. He indicated that the Board of Review never spoke to Officer Hall or any witness. Regardless, the Board of Review found that Officer Hall properly used fatal force in this incident. Mr. Merritt never saw anything in writing which would verify that Officer Hall received deadly force training after

1985. While sitting on the Board of Review, he did not review any of the training that Officer Hall had received.

The defendants called James Jackson, who has been the Commander of the Training Support Division of the Detroit Police Department since 1978. He has been designated as the leading authority on the question of training of Detroit police officers. On direct examination he testified that the Detroit Police Department is a well trained, well supervised, highly disciplined force. His office was requested to verify Officer Hall's actual training with either firearms or training of any kind. The only documents that the Detroit Police Department could produce were plaintiff's Exhibit 159, a Fatal Force Police Test, which was blank, the curriculum for the 1969-1970 class No. 70-C, and plaintiff's Exhibit 156, the firearms qualification record of Officer Joseph Hall. According to Mr. Jackson, the academy normally keeps the scores of the officers even though they do not keep the tests themselves, but the academy could not verify in writing that Officer Hall took the fatal force policy test, which tested the knowledge of "basic safety rules as to when to shoot." Mr. Jackson also acknowledged that he doubted whether every officer had received in-service update training between 1982 and 1987. Finally, Mr. Jackson, during the trial, had to contact the Michigan State Police to verify that Joseph Hall was a certified police officer since that fact could not be verified with the Detroit Police Department records.

The defense also called Michael Falvo, who is an attorney and an inspector with the Detroit Police Department is responsible for their disciplinary process. Contrary to the forensic testimony in this case, he felt that the officer's version in his report of what occurred was a physically possible scenario.

On July 9, 1992, the jury found both defendants liable, Officer Hall on both the state and federal claims, and the City of Detroit on both failure to train and failure to discipline theories. In addition, the jury found no cause of action as to Officer Hall's counterclaim.

District Court Judge Paul V. Gadola, in ruling on the (under advisement) motion for directed verdict and for judgment notwithstanding the verdict stated:

> While there certainly can be a sincere and a vigorous difference of opinion regarding the weight of the testimony, regarding the various expert opinions offered with regard to

> the City of Detroit's process of discipline and training, and also certainly there can be a difference of opinion regarding the evidence concerning the performance of Officer Hall, there's certainly evidence in the record from which the jury, exercising its prerogative in judging credibility and giving weight to the evidence, could have determined, in the Court's estimation, that the policy of the City of Detroit regarding training and discipline of its officers in the use of deadly force reflected deliberate indifference to the citizenry. That's certainly a matter that was hotly in dispute throughout the trial, but certainly there was some evidence in the trial from which the jury could've — could have reached that conclusion. And to — to refuse to allow the jury to reach that conclusion in this case would be to totally disregard the testimony — the testimony presented by the Plaintiff in this case, including, among others, and most importantly in that regard, the testimony of Mr. Postill.
>
> That testimony is — is — his testimony was subjected to vigorous cross-examination, and — and impeachment, but nevertheless, there was certainly from the verdict that was rendered, there was credibility given to that testimony and weight given to that testimony by the — by the jurors.
>
> I comment on that especially because really on the issues of training and discipline, his testimony was rather significant, although there was other damaging testimony insofar as the City was concerned in that there seemed to be a derth (sic) of record keeping or available records. Again, there were explanations offered as to why all the records were missing, but again, the jury could draw a conclusion that the lack of the records indicated a lack of — of the necessary training. And it's very possible that the jury drew that very conclusion.

Both Officer Hall and the City of Detroit filed timely appeals with the United States Court of Appeals for the Sixth Circuit. While the matter was pending on appeal, the parties resolved the case against Officer Hall. The Court of Appeals issued an opinion on June 17, 1994, reversing the jury verdict as to the City of Detroit and remanding the case back to the lower court for an entry of judgment as a matter of law pursuant to Fed.R.Civ.P. 50(b). Thereafter, petitioner filed a Petition for Rehearing *en banc*, which was denied on August 23, 1994.

## REASONS FOR GRANTING THE WRIT

### I.

**THE COURT OF APPEALS FOR THE SIXTH CIRCUIT EFFECTIVELY VIOLATED PETITIONER'S SEVENTH AMENDMENT RIGHT TO TRIAL BY JURY BY REVERSING AN AWARD FOR DAMAGES AND REMANDING THIS CAUSE TO THE DISTRICT COURT FOR ENTRY OF A JUDGMENT NOTWITHSTANDING THE VERDICT, BASED UPON THE EVIDENCE BEING LEGALLY INSUFFICIENT, WHEN, IN FACT, PETITIONER PRESENTED OVERWHELMING EVIDENCE TO SUPPORT THE VERDICT.**

The decision of the Sixth Circuit Court of Appeals, reversing the district court's denial of a motion for judgment notwithstanding the verdict, and remanding this cause for entry of a judgment for no cause of action, effectively denied petitioner her right, secured by the Seventh Amendment to the United States Constitution, to trial by jury. Since petitioner clearly presented more than sufficient proofs on the issue of the City of Detroit's failure to train and discipline its police officers, and the district court correctly denied directed verdicts or judgment notwithstanding the verdict, no appellate court may substitute its opinion on the facts for that of the jury without abrogating what must be a judicially guarded right: that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const, amend. VII

Since the Court of Appeals was clearly wrong in concluding that the evidence was insufficient to go to the jury, then their reversal violates the Seventh Amendment and constitutes plain constitutional error. *See, Neely* v. *Martin K. Eby Construction Co., Inc.*, 386 U.S. 317, 332; 87 S.Ct. 1072; 18 L.Ed.2d 75, 86 (Black, J., dissenting), *reh. den.*, 386 U.S. 1027; 87 S.Ct. 1366; 18 L.Ed.2d 471 (1967); *Globe Liquor Co.* v. *Sam Roman*, 332 U.S. 571; 68 S.Ct. 246; 92 L.Ed. 177 (1948); *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212; 67 S.Ct. 752; 91 L.Ed. 849 (1947)

It is precisely because petitioner is claiming that her Seventh Amendment constitutional right was violated by the Court of Appeals decision that this Court should carefully consider the granting of certiorari. As was held in *Dimick* v. *Schiedt*, 293 U.S. 474; 55 S.Ct. 296; 79 L.Ed. 603 (1935), any seeming curtailment of the right to a jury trial shall be scrutinized with the utmost of care.

Lee Floyd Berry, Jr. was shot to death by a Detroit police officer who killed him with a weapon he was not qualified to use and, in fact, had not been qualified by his department to use any weapon for three years prior to that shooting. The officer, Joseph Hall, claimed in testimony that his .45 caliber Smith & Wesson went into "automatic" during the incident, a proven impossibility. The officer's lack of training is further verified by the incident itself. He shot an unarmed young man in the back with a .45 caliber hollow point bullet, meting out a death penalty because of a series of traffic misdemeanors. Understanding that a single incident would be insufficient to impose municipal liability, *see*, *City of Oklahoma City* v. *Tuttle*, 471 U.S. 808; 105 S.Ct. 2427; 85 L.Ed.2d 791 (1985), the petitioner proceeded with a variety of additional evidence proving that the City of Detroit failed to train and discipline its police officers.

Petitioner's police practices expert, Frederick Postill, acknowledged that the basic training program of the Detroit Police Department was adequate. However, he also indicated that proper police training procedures required, at the very least, annual firearms training and qualification and at least forty hours per year formal training updates. Even James Jackson, Commander of the Detroit Police Department, who was called by the City as an expert on the City of Detroit's police training programs, conceded that he doubted whether every officer on the force received annual in-service updated training in the five years preceding the killing of Lee Berry, Jr.

Mr. Postill reviewed shooting incidences for the time period of 1982 through 1987. During this five year time span, Mr. Postill and Detroit Police Department data verified that there were 636 instances in which Detroit police officers used deadly force by discharging their firearms. In the 636 instances, 1,538 shots were fired at an average distance of 30-35 feet from the officer's target. From this information, Mr. Postill testified that the shootings represented a fairly frequent use of fatal force by Detroit police officers and that the Detroit Police Department had a practice of justifying the shootings as self-defense. Of the 636 instances, 502 of them were justified as self-defense, a conclusion not supported by the Department's own statistical data.

Of the 636 instances, 277 involved shooting at burglary suspects. Mr. Postill pointed out that even prior to the Supreme Court's decision in *Tennessee* v. *Garner*, *supra*, the Detroit Police Department had

a policy requiring officers to exhaust all reasonable means before shooting at a burglar. Mr. Postill testified that shooting at a burglar leaving the scene of a burglary would be improper under any circumstances under the law after *Garner*, and would have been improper prior to *Garner* under the City's own policy.

Mr. Postill specifically examined the entire police files regarding 161 of the 636 incidents. He found that 78 of these incidents were "unjustifiable" on the basis of "existing law and Detroit city policy." He further indicated that out of the 161 incidents, only 15 officers were disciplined, and in seven of these cases, the disciplinary action was held in abeyance, which meant, in effect, that no discipline was meted out. Mr. Postill further described in great detail thirteen specific instances in which he thought police officers should have been disciplined.

Mr. Postill testified that the department tolerated the reckless use of firearms. "They either get no discipline or a slap on the wrist." He indicated that the City's failure to direct, train and discipline their officers not to improperly use deadly force constituted a pattern of gross negligence. During the years 1983 through 1987, three officers were shot in the line of duty — two by other officers, 37 civilians were killed and 126 civilians were wounded. Mr. Postill felt that if you have a pattern or practice of failing to properly supervise, discipline and train officers with regard to the use of deadly force, it sends a particular message that the department tacitly approves of officers not complying with written departmental policy. He testified that well trained, well supervised officers would not be involved in the kinds of situations that he found in the 78 cases of unjustifiable shootings.

In rebuttal, the City called James Jackson, who had been the Commander of the Training Support Division of the Detroit Police Department since 1978. He indicated that the Detroit Police Department is a well trained, well supervised, highly disciplined force. However, in an attempt to verify the training that Officer Hall had received from the department, his office could only produce Exhibit 159, a blank fatal force policy test and the curriculum for 1969 and early 1970 for the class 70-C, and Exhibit 156, the firearm's qualification record of Officer Hall. The academy could not verify in writing that Officer Hall even took the fatal force policy test, which tested knowledge of "basic safety rules as to when to shoot." Furthermore, the Detroit

Police Department had to contact the Michigan State Police, *during the trial*, in order to even verify that Officer Hall was a certified policeman for the State of Michigan since the Detroit Police Department could not verify that fact from its own records.

The Court of Appeals made short shrift of the evidence produced by petitioner as to the issue of training, and indicated "the evidence developed during the trial was simply insufficient to support the jury's finding that the City pursued an official policy or custom of failing to *train* its officers adequately in the proper use of deadly force." *Berry, supra* at 1347 (emphasis in original); B-8 The Court of Appeals decision then went on to reverse the jury's verdict under the failure to discipline theory.

The appellate court's conclusion that the evidence was insufficient to support the jury's verdict is inconsistent with the trial record and with the standards of appellate jurisprudence. Most troubling of all is the way in which the appellate court ordered the entry of a judgment as a matter of law in favor of the City of Detroit on the basis of arguments not made at trial, and perceived errors which had never been raised on appeal.

The Court of Appeals identified three "problems" with the jury verdict against the City of Detroit. The Court does not state whether "a problem" is the jurisprudential equivalent of an "error" or whether each of the "problems" would constitute grounds for reversal. A close analysis of the appellate court's discussion of these "problems" demonstrates that, for the most part, the "problems" were not noted by either the trial court or appellant City of Detroit on appeal.

The appellate court notes that "First there is the problem of the jury's perception of a case of this nature." According to the Sixth Circuit, the jury "was not told that, under the collective bargaining agreement existing between the City and the police, the City was obligated to pay any judgment" rendered against Officer Hall, and that there was a danger that the jury rendered its decision against the City in an effort to find a deep pocket. The opinion continues, "Jurors would be less than human if they did not factor in a plaintiff's chances of ever directly collecting six million dollars from a police officer." *Berry, supra* at 1348; B-9

It is difficult to understand how this somewhat cynical observation can rise to the level of a "problem" justifying (or even militating towards) reversal of a jury verdict in light of both the well-established proposition that "jury awards are always given the utmost deference and respect" *Parker* v. *District of Columbia*, 850 F.2d 708, 711 (D.C. Cir. 1988), quoting from *Morgan* v. *District of Columbia*, 824 F.2d 1049, 1056 (D.C. Cir. 1987), and, of course, the well-established proposition that it is inherently prejudicial and reversible error to tell a jury, as the panel suggests, that indemnification agreements exist between deep and shallow pocket defendants. *Larez* v. *Holcomb*, 16 F.3d 1513, 1519-1520 (9th Cir. 1994); *Green* v. *Baron*, 879 F.2d 305, 310 (8th Cir. 1989); *Griffin* v. *Hilke*, 804 F.2d 1052, 1057 (8th Cir. 1986).

The Court of Appeals identifies the second "problem" as the testimony of petitioner's expert witness, Frederick Postill. The Court expressed "grave concerns" about the witness' qualifications "to opine as he did" and then proceeds to detail what it perceives as the gaps in the testimony regarding his training, experience and expertise. Note that these concerns were not raised by the appellant City of Detroit. In addition, while trial counsel for the City of Detroit made a pro forma objection to the trial court's ruling regarding Mr. Postill being qualified to give opinion testimony, the objection was unsupplemented by any specific grounds or arguments and no argument was ever made on appeal regarding the qualifications of Mr. Postill to give the testimony that he gave. Furthermore, the discussion by the Court of Appeals as to Mr. Postill's background is strikingly one-sided and omits more aspects of Mr. Postill's background, including the fact that he is almost two-thirds of the way towards a doctorate in criminal justice; that he was employed by the United States Department of Justice for four years developing training programs for sheriffs across the country; that he served as a full-time assistant professor at the School of Criminal Justice at Michigan State University; that he taught for six additional years in criminal justice programs at two other schools; and that he has been certified by the State of Michigan Law Enforcement Training Counsel as a teacher of police field procedures.

Notwithstanding the fact that Mr. Postill's qualification were not an issue on appeal, the Court of Appeals attacked the scope, nature and

relevance of Mr. Postill's qualifications in a manner which may well have been properly made to the jury where they presumably would have been presented by an advocate rather than a judge of an Article III Court.

The Court of Appeals then proceeded to chastise the trial court for failing to fulfill the "gatekeeper" function with relation to the expert testimony supposedly identified by the this Court in *Daubert* v. *Merrell Dow Pharmaceutical, Inc.*, ___ U.S. ___; 113 S.Ct. 2786; 125 L.Ed.2d 469 (1993). Here again, this issue was not raised in either the trial court or on appeal. Equally troubling, however, is the fact that the panel's discussion of the subject matter ignores the central teachings of *Daubert*, that Rule 702, F.R.Evid., should be interpreted in light of the "liberal thrust of the federal rules, their general approach of relaxing the traditional barriers to "opinion" testimony, 113 S.Ct. *supra* at 2794, quoting *Beech Aircraft Corp.* v. *Rainey*, 488 U.S. 153, 169 (1988), and that inquiry envisioned by Rule 701 is, we emphasize, a flexible one." *Daubert*, 113 S.Ct. at 2797 (footnote omitted)

No objection was ever made to any particular question put to Mr. Postill as calling for an opinion outside the scope of his expertise. Had such an objection been made, petitioner would have had an opportunity to either amplify the record regarding the witness' qualifications or to reframe the inquiry in a way which might ultimately have been more satisfactory to the higher courts. It is out of considerations such as this that the nature of our adversary system of justice, that "no objection - no review" rules such as are encompassed by Rule 61, F.R.Civ.P., are born.

The appellate court's real objection to Mr. Postill's testimony seems to be that it was "couched in the precise language used in case law, either indicating a keen awareness by Postill of the direction in which he had to head, or else careful coaching prior to his testimony." *Berry*, *supra* at 1353; B-19 The Court of Appeals seemed to be taken aback by Mr. Postill's testimony that the Detroit Police Department's failure to discipline and train its officers with respect to the proper use of deadly force constituted a pattern of gross negligence and deliberate indifference. These terms were explained by Mr. Postill to the jury in his own common language meaning. More importantly, Mr. Postill explained the basis for his conclusions. It might also be noted that courts other than the Second Circuit have

held that an expert witness' use of the term "gross negligence" was permissible, particularly where — as in the case at bar — the meaning of the term was explained by the trial judge to the jury as was the proper way to be given the expert's testimony. *E.g., Parker* v. *Williams*, 855 F.2d 763, 777 (11th Cir. 1988) Furthermore, this type of testimony was upheld by the Tenth Circuit in *Zuchel* v. *City and County of Denver, Colorado*, 997 F.2d 730, 742 (10th Cir. 1993), which indicated "A witness may refer to the law in expressing an opinion without that reference rendering the testimony inadmissible." (Citing *Specht* v. *Jenson*, 853 F.2d 805, 809 (10th Cir. 1988, *en banc*)

Most significantly, the appellant City of Detroit did not object to the questions or answers in which Mr. Postill rendered these opinions, either in the trial court or on appeal, and the "legal conclusion" critique of the Postill testimony originated wholly and solely with the Court of Appeals itself. The fact that the Court of Appeals did not see fit to mention or be bound by the lack of objection or appellate argument on this issue, is itself troubling. The fact that the City of Detroit never raised the objection to the nature and form of Postill's testimony in this regard in the trial court, so that plaintiff never had an opportunity to attempt to ask other or different questions, or to attempt to adduce the expert's opinion in a form which would be "less suspect" to the judges reviewing the record, in light of this, is difficult to understand why, when those judges found the form of the testimony disagreeable, they would not, at the very least, order a new trial so as to give the petitioner the opportunity to reframe the testimony which was only first found objectionable on appeal, and by a reviewing court at that.

The Court of Appeals identifies the third "problem" as the failure of the testimony to support the jury's verdict on the failure to discipline issue. This Court has never specifically ruled on the issue of failure to discipline, which is the primary reason why this Court should grant certiorari on this case. The Court of Appeals did hold:

> In the failure to discipline context, it is appropriate to apply the deliberate indifference standard adopted by the Supreme Court in *City of Canton* v. *Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989), to require a showing of a history of widespread abuse that has been ignored by the City. (Citations omitted) ("The lower courts that have

> applied the 'deliberate indifference' standard we adopt today have required a showing of a pattern of violations from which a kind of 'tacit authorization' by city policy-makers can be inferred.") *Berry, supra* at 1354 (citations omitted); B-21

The Court of Appeals then went on to reject the testimony of Mr. Postill and substitutes its own conclusions as to the meaning of the evidence. Furthermore, the Court felt that the jury never found that the alleged failure to discipline properly constituted "deliberate indifference."

> They never reached this conclusion because they never were asked this question. The only question on the verdict form relating to discipline reads as follows:
>
> V
>
> We, the jury, on the § 1983 federal Civil Rights claim against the City of Detroit for failing to adequately discipline its police officers for the improper use of deadly force find for:
>
> __X__ The Estate of Lee Floyd Berry, Jr.
>
> _____ City of Detroit.
>
> Nowhere did the jury conclude in its answers to the verdict form's written interrogatories that the failure to discipline constituted "deliberate indifference." Nor was the question of proximate cause put to the jury in any of the verdict form questions. All of this amplifies the error in allowing plaintiff's expert to testify that the failure to discipline constituted "deliberate indifference." *Berry, supra* at 1355-1356; B-24

The Court of Appeals ignored a number of facts which one would think should have been given some decisional significance. First, the City did not object to the Special Verdict Form. Secondly, the jury was properly instructed on the issue of deliberate indifference, as well as proximate cause. Third, the use of Special Verdict Forms, and the form of such forms, is discretionary with the trial court and not mandatory. *See, e.g., Garwood* v. *International Paper Company*, 666 F.2d 717 (5th Cir. 1982) When such a procedure is employed, "it should never be used for mere cross-examination of the jury to

create error for the record." *Morris* v. *Pennsylvania Railroad Co.*, 187 F.2d 837, 841 (2nd Cir. 1951) Finally, the very rule which provides for the use of such verdicts specifically provides that if in submitting the form "the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by a jury of the issues so admitted unless before the jury retires the party demands its submission to the jury." Rule 49(a), F.R.Civ.P. No such demand was, of course, made in the case at bar and this procedural default should have foreclosed any appellate reliance, whether by the City of Detroit or by the Court of Appeals, and any omissions from the form which hindsight might have disclosed.

The jury's verdict did not rest solely on the testimony of witness Postill. The jury had before it as well, much of the data upon which Postill himself relied, and upon which he based his conclusions, and the jury could have easily reached its own independent conclusion from that data, whether or not Postill had offered testimony regarding his own opinion. Given this, the panel's decision to vacate the jury's verdict seems clearly wrong by the standards of review ordinarily applied to jury verdicts. Thus, neither a trial judge nor the appellate court is "free to weigh the evidence." *Garbin* v. *Greenbank*, 856 F.2d 1392, 1396 (9th Cir. 1988) Evidence is to be viewed in light most favorable to the prevailing party, and the jury's verdict based upon such evidence can only be set aside when it is "so clearly wrong that reasonable persons could not reach any other conclusion than that asserted" against the verdict. *Slakan* v. *Porter*, 737 F.2d 368, 373 (4th Cir. 1984) It is clear from the Court of Appeals' decision that the appellate court did not care much for the testimony of witness Postill. However, the jury apparently accepted that testimony, rejecting countervailing testimony by two high ranking Detroit police officials, George W. Merritt, a Commander of the Detroit Police Department, and James Jackson, a Commander of the Department and formerly Inspector in Charge of the Detroit Police Academy, both of whom testified that the Detroit Police Department training program and discipline process are exemplary. Judgments such as these are uniquely within the province of the jury in our system of justice. A judgment as a matter of law reversing the jury verdict is inappropriate where the case depends on witness' credibility. *Tavoulareas* v. *Piero*, 759 F.2d 90, 105 (D.C. Cir. 1985) The Court of Appeals decision flies clearly in the face of this principle, setting aside a jury verdict

based upon the appellate court's own view of the evidence and ordering the entry of a verdict contrary to that rendered by the jury based upon the appellate court's re-examination of the facts tried by the jury, without giving petitioner an opportunity to cure the perceived defects in her proofs. Such a legal analysis clearly denies petitioner's right to a trial by jury assured by the Seventh Amendment of the United States Constitution. *C.f., Fineman* v. *Armstrong World Industries, Inc.*, 980 F.2d 171, 183-184 (3rd Cir. 1992)

Both as to the number of cases examined and the length of time involved, the evidence produced by petitioner as to the lack of training and discipline went far beyond the essentially anecdotal showings made in the cases of *Spell* v. *McDaniel*, 824 F.2d 1380 (4th Cir. 1987); *Fiaco* v. *Rensselaer, N.Y.*, 783 F.2d 319 (2nd Cir. 1986) and *Zuchel* v. *City and County of Denver*, 997 F.2d 730 (10th Cir. 1993), cases which, according to the Court of Appeals, "stand in stark contrast to the case at bar." *Berry, supra* at 1355; B-22 Rather than a handful of instances of unpunished police excesses, petitioner in the case at bar documented case after case of undisciplined, improper use of deadly force — precisely of the sort which lead to the injury complained of. Testimony established that the Detroit Police Department overwhelmingly upheld these shootings under a self-defense theory when the underlying facts did not support self-defense — exactly as Officer Hall attempted to do to the apparent satisfaction of the Detroit Police Department in the case at bar. Such evidence certainly raises a jury question regarding causation. Mr. Postill specifically reviewed 161 cases and found 78 of these shootings to involve "the unjustifiable", improper use of deadly force. He offered detailed analysis of thirteen of these 78 shootings that had gone unpunished by the department. By its verdict, the jury obviously agreed with plaintiff's expert. That the jury was free to reach this conclusion on the evidence was the central point of the trial court's opinion in denying the City's motion for a directed verdict and judgment notwithstanding the verdict as is detailed in the Statement of Facts.

Underscoring the testimony regarding the pattern and practices of the Detroit Police Department was the undeniable fact that the death of petitioner's son represented an egregious use of deadly force. Not only could Officer Hall not tell the difference between a revolver, that

fires a single shot every time the trigger is pulled, and an automatic, which would fire a burst of shots when the trigger is pulled, but he gunned down a young man over traffic misdemeanors. Instead of this officer being disciplined, he was given a disability pension. While this evidence, standing alone, would not have been a sufficient basis for municipal liability, it was certainly circumstantial evidence of both petitioner's theory of municipal liability and the causal link between the evidence and municipal indifference in the injuries suffered by the decedent and his family. Taking away this jury verdict as to the City of Detroit is simply unfair.

Despite the Court of Appeals painstaking attack on petitioner's expert witness, the evidence did support that there was one incident after another within a five year period preceding petitioner's son's killing in which police officers of the City of Detroit Police Department recklessly discharged their firearms, injuring or killing citizens or other police officers under circumstances in which rarely anyone received any significant discipline. During a five year time span, 37 persons were killed, including two police officers killed by other police officers. The thirteen examples cited by petitioner's expert were egregious examples regarding the improper use of deadly force. These are facts and not an expert witness' opinion. These are also facts that were not rebutted by the City of Detroit during the trial.

A particular problem, and a primary reason why a writ of certiorari should issue as to this case, is that this Court has not set forth specific guidelines as to the use of expert witnesses in cases such as this, nor has the Court made a ruling as to whether municipal liability exists under 42 U.S.C. § 1983 for failing to discipline police officers.

The case of *City of Canton, Ohio* v. *Harris*, 489 U.S. 378; 109 S.Ct. 1197; 103 L.Ed.2d 412 (1989), certainly sets forth a deliberate indifference standard as to training and imposes an obligation on a municipality to note and correct widespread misconduct by its employees. The evidence in the underlying case falls squarely within the holding of *Harris, supra*, and the Court's particularly insightful comment:

> For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part

> to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force, *see*, *Tennessee* v. *Garner*, 471 U.S. 1 (1985), can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.
>
> It could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plenty obvious to the city policymakers who, nevertheless, are deliberately indifferent to the need. *Harris*, 489 U.S. at 390, fn. 10

With all due respect to the Court of Appeals' decision, that Court had to have ignored entire portions of the record when it concluded that the evidence was simply insufficient to support the jury's finding on a failure to train issue. Direct and circumstantial evidence proved that for a five year period preceding the decedent's death, Detroit police officers were using their firearms in ways that no self-respecting gun owner would ever dare use. Would an adequately trained policeman play with a loaded firearm in front of a toddler? Would an adequately trained policeman discharge his weapon at a motorist over a traffic altercation? Would an adequately trained policeman fire at a burglary suspect who is more than thirty feet away and is unarmed and causing no danger to anyone? Would an adequately trained police officer fire into a crowded parking lot at a suspect and kill an innocent bystander? Would an adequately trained policeman know the difference between a single shot revolver and an automatic weapon? Would an adequately trained policeman shoot an unarmed civilian in the back over a misdemeanor traffic stop? This and much more of this kind of evidence is what the jury relied upon. If the evidence that was presented in this case does not create a question of fact for the jury, then this Court should set forth what type of evidence would create a question of fact for the jury on the issue of failure to train.

Clearly, the Court of Appeals delved into a much greater analysis in dismissing the failure to discipline theory. The decision seems to suggest that plaintiffs are required to produce some sort of behavioral science testimony on the issue of discipline. In response to that analysis, what is wrong with a jury being made aware of the types of

instances in which firearms were recklessly discharged and in which they were told no discipline was meted out? How can that not raise an issue of fact for the jurors as to the issue of discipline? Common sense says that if you have certain rules and those rules are being violated and no enforcement of any kind by way of discipline is being meted out, that there is a pattern of failing to discipline. The jury concluded, in essence, that the City of Detroit failed to take appropriate measures to rectify the ongoing reckless use of firearms within its department. In one egregious example after another, no discipline was meted out. How can one justify the setting aside of this jury verdict based on this kind of evidence?

A comment made by the Court of Appeals which clearly demonstrates the Court was simply substituting its judgment for the jury's judgment is the conclusion. "Here, the City had an acceptable and follow-up program to communicate to its officers its constitutional policy on the use of deadly force. It has procedures in place for reviewing incidences when the policy may have been violated." *Berry, supra* at 1355; B-23 That conclusion is simply not borne out by the evidence. What acceptable training and follow-up program was in place? Here, Officer Hall did not receive any follow-up training beyond that of the academy and it is unclear as to whether he in fact received any training at the academy since no documents verified that contention. In addition, even though there was a procedure in place to review incidences of when the deadly force policy may have been violated, one must presume that the Court of Appeals was referring to the Board of Review. The Board of Review, which was required to impartially investigate and make its own conclusion as to the underlying shooting, according to the evidence, did not do its job. Historically, the Board of Review has not done its job with the City of Detroit. The evidence demonstrated that none of the Board of Review members spoke to any of the witnesses, including Officer Hall. Furthermore, the evidence suggested that time and time again, the City of Detroit Police Department overwhelmingly justified its shootings as self-defense when their own statistical data did not support such conclusion.

The most frightening aspect of the Court of Appeals opinion is the reality that it has told the City of Detroit, inspite of the evidence presented by petitioner, its training and follow-up training program is

fine and it has not been deliberately indifferent to the rights of its inhabitants. Obviously, citizens such as Lee Floyd Berry, Jr., and others, who were subjected to the improper use of deadly force, know differently.

The Court of Appeals decision violates the general proposition that a motion for directed verdict or a judgment notwithstanding the verdict may only be granted, or a jury verdict after the denial of such motion set aside, when "there is either a complete absence of proof on the issues or no controverted issues of fact upon which reasonable men could differ." *Sawchik* v. *E. I. DuPont Denemours & Co.*, 783 F.2d 635, 636 (6th Cir. 1986) For whatever reason, the Court of Appeals decision simply disregards the issues of fact created by petitioner's proofs and substitutes its own judgment. This Court is the last forum for this petitioner to seek justice. Justice requires that the Court of Appeals decision be reversed.

## II.

**THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ABUSED ITS DISCRETION BY REVERSING A JUDGMENT AND A VERDICT OF A DISTRICT COURT BASED UPON ARGUMENTS NEITHER RAISED IN THE DISTRICT COURT NOR UPON APPEAL TO THE SIXTH CIRCUIT.**

On appeal, and at best, the Sixth Circuit Court of Appeals found that there were some "problems" with the testimony of the expert witness. Assuming arguendo there was such a problem, that problem rises only to the level of harmless error. As the Federal Rules of Civil Procedure require:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties. Fed.R.Civ.P. 61

Although, in the technical sense, the above rule only applies to district courts, appellate courts should act in accordance with the salutary policy embodied in this rule. *See*, *McDonough Power Equipment, Inc.* v. *Greenwood, Kansas City*, 464 U.S. 548; 104 S.Ct. 845; 78 L.Ed.2d 663 (1984) The lack of objection to Mr. Postill's testimony reflecting his ultimate opinion should have foreclosed any review of Mr. Postill's testimony. Certainly, Mr. Postill's testimony did not affect the substantial rights of the parties.

Since the reasons relied upon by the Court of Appeals were neither raised at trial nor in the City of Detroit's Brief on Appeal, it was clear error for the appellate court to reverse the decision of the district court and remand for a judgment notwithstanding the verdict.

## CONCLUSION

Petitioner, Doris Berry, as Personal Representative of the Estate of Lee Floyd Berry, Jr., Deceased, respectfully requests that this Honorable Court summarily reverse the Court of Appeals for the Sixth Circuit pursuant to Rule 16.1 of the Supreme Court Rules, and remand the case back to the Court of Appeals for entry of the original jury verdict. In the alternative, Petitioner requests that this Honorable Court grant this Writ of Certiorari.

Respectfully submitted,

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DATED: November 16, 1994.

# APPENDICES TO PETITION FOR CERTIORARI

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## APPENDIX A

### ORDER DENYING PETITION FOR REHEARING EN BANC

(United States Court of Appeals — Sixth Circuit)

(Filed August 23, 1994)

(DORIS BERRY, PERSONAL REPRESENTATIVE OF THE ESTATE OF LEE F. BERRY, JR., DECEASED, Plaintiff-Appellee, v. CITY OF DETROIT, Defendant-Appellant, JOSEPH HALL; WILLIAM L. HART, Defendants — No. 92-1688)

**BEFORE:** MILBURN and GUY, Circuit Judges:
and KRUPANSKY, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green,
Clerk

# APPENDIX B

## OPINION

*RECOMMENDED FOR FULL-TEXT PUBLICATION*
**-Pursuant to Sixth Circuit Rule 24-**
ELECTRONIC CITATION: 1994 FED App. 0215P (6th Cir.); File Name: 94a0215p.06

(United States Court of Appeals — Sixth Circuit)

(Decided and Filed June 17, 1994)

(DORIS BERRY, Personal Representative of the Estate of Lee F. Berry, Jr., deceased, Plaintiff-Appellee, v. CITY OF DETROIT, Defendant-Appellant — No. 92-1688; ON APPEAL from the United States District Court for the Eastern District of Michigan)

**BEFORE:** MILBURN and GUY, Circuit Judges;
and KRUPANSKY, Senior Circuit Judge.

RALPH B. GUY, JR., Circuit Judge.

A jury awarded Doris Berry (plaintiff), six million dollars for the death of her son, Lee Berry, Jr., who was shot by a Detroit police officer. On appeal, the City of Detroit (City) raises three arguments. First, the City asserts that plaintiff failed to offer any evidence that the City's policymakers had adopted a policy or ratified a custom of unconstitutional use of deadly force. Second, the City argues that plaintiff's evidence of the City's alleged failure to train and discipline its officers failed to show any custom or policy of the City that amounted to deliberate indifference to the rights of citizens or, alternatively, that there was no evidence that any alleged failure on the City's part was a proximate cause of Lee Berry's death. Finally, the City takes issue with the jury instructions. We conclude that plaintiff's evidence was insufficient to prove deliberate indifference on the part of the City such as to give rise to municipal liability under 42 U.S.C. § 1983. Therefore, we reverse the judgment against the City.

*I.*

On June 23, 1987, Lee Berry, Jr. (Lee), who was employed in a family moving business, was driving the company van in rush-hour traffic to the family residence in Detroit. According to the testimony

of Lee's sixteen-year old brother, Dwayne Berry, and his eight-year-old nephew, David Askew, both of whom were in the van, Lee committed several misdemeanor traffic violations during this journey. The infractions consisted of running a red light, driving on the wrong side of the road, and passing three cars that were stopped for a red light.

These traffic offenses attracted the attention of Officer Joseph Hall, a 17-year veteran of the Detroit Police Department. Exactly what happened immediately thereafter, however, is a matter of some dispute. On the witness stand, Hall testified — in contrast to the testimony of the surviving occupants of the van and in partial contradiction of his earlier deposition testimony — that the violations prompted a dangerous, high-speed chase involving the police. Dwayne and David, on the other hand, offered a markedly different account of what transpired. They testified that Lee had not been speeding, had not attempted to flee from arrest, and had not committed any traffic violations other than those described above.

Moments after the van arrived at the Berry family home, Hall arrived on the scene. Hall confronted Lee Berry and a struggle then ensued, during which Hall shot Lee in the back from a distance estimated as being between three and ten feet.[1] Although no eyewitnesses observed the shooting, David, Dwayne, and several bystanders stated that Hall, upon his arrival at the Berry home, used profanity, threats, and physical force in attempting to effect an arrest. Hall, however, claimed that Lee attacked him; that the gun fired accidently when Lee, during their struggle, attempted to wrestle the pistol away from him; and that he continued to fire at Lee while Lee was fleeing because the firearm was set on "automatic" and because his (Hall's) vision had been impaired by blood. Plaintiff's expert witnesses opined that Lee had not touched Hall's revolver because Lee was several feet away from the gun when it fired, that Hall had not been blinded by blood, and that Hall's service revolver lacked any type of "automatic" firing mechanism.

Shortly after the incident, the police department conducted an investigation that exonerated Hall. No criminal charges were

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1 **The forensic evidence supported the inference that Lee was fleeing from Hall when he was fatally shot.**

brought against him and no sanctions were imposed upon him. At the time of trial, Hall remained a member of the Detroit Police Department on disability retirement with full pension benefits.

Plaintiff initiated this suit against Hall and the City[2] under 42 U.S.C. § 1983. Plaintiff's complaint also listed several state law causes of action. Plaintiff claimed that the City pursued a deliberate policy of failing to train or discipline adequately its police officers in the proper use of deadly force, which failures caused the violation of Lee's constitutional rights under the Fourth and Fourteenth Amendments. At the conclusion of the trial, the jury returned verdicts against both Hall and the City in the amount of six million dollars.

Both Hall and the City appealed from the denial of their motions for j.n.o.v. or for a new trial. While this appeal was pending, the parties settled Hall's appeal and jointly moved for an order remanding that appeal for consideration of the settlement. As a result of this settlement, the City's obligation under the judgment was reduced to two and one-half million dollars. The only question before this court is the issue of municipal liability for Lee Berry's death.

*II.*

Pursuant to the Detroit City Charter, the Board of Police Commissioners (Board) is the agency with authority to establish City policy for the Detroit Police Department. The chief of police administers the department pursuant to the policies, rules, and regulations established by the Board. The City argues that plaintiff failed to introduce any evidence of a custom or a deliberate choice of the Board to adopt a policy of inadequate training or discipline with regard to the use of deadly force, and that evidence of such a custom or choice is necessary to sustain a judgment against the City under 42 U.S.C. § 1983. This is an incorrect statement of the law.

Any discussion of municipal liability under § 1983 begins with *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978). In *Monell*, the Supreme Court held that municipalities can be sued

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[2] The first amended complaint also named Detroit Police Chief William L. Hart as a party defendant. Chief Hart was dismissed from the action on summary judgment, which dismissal is not at issue in this appeal.

directly under § 1983 where the action of the municipality itself can be said to have caused the harm, as when "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.* at 690. Municipal liability for the actions of employees may not be based on a theory of *respondeat superior*. *Monell* went on to clarify that municipal liability may be predicated upon grounds other than explicit expressions of official policy:

> Moreover, although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decision-making channels.

*Id.* at 690-91.

More recently, the Court addressed the issue of municipal liability under § 1983 when the plaintiff has alleged that his or her rights were violated as a result of a municipality's failure to train its police officers adequately. In *City of Canton* v. *Harris*, 489 U.S. 378 (1989), the plaintiff had been arrested and brought to the police station, whereupon she slumped to the floor on two separate occasions and was left lying there. The plaintiff brought a § 1983 action against the city for failure to train its officers to recognize when a person in custody is in need of medical assistance. The Court held that

> the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. This rule is most consistent with our admonition in *Monell*, 436 U.S., at 694, and *Polk County* v. *Dodson*, 454 U.S. 312, 326 (1981), that a municipality can be liable under § 1983 only where its policies are the "moving force [behind] the constitutional violation."

> Only where a municipality's failure to train its employees in a relevant respect evidences a "deliberate indifference" to the rights of its inhabitants can such a shortcoming be properly thought of as a city "policy or custom" that is actionable under § 1983.

*Id.* at 388-89 (footnote omitted).

The City observes that the only policy decision it made concerning the use of deadly force by police officers was the deadly force policy that the Board formally established on June 19, 1986. No one disputes that this policy, as written, is constitutional. The City argues that, because there was no other formal policy decision made by the Board, it cannot be held liable. The Supreme Court, however, has concluded that there need not be a formal policy for there to be an unconstitutional custom that amounts to a policy. "It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice ... can establish what is state law." *Nashville, Chattanooga & St. Louis Ry.* v. *Browning*, 310 U.S. 362, 369 (1940) (quoted in *Monell*, 436 U.S. at 691 n. 56). In *City of Canton*, the Court clarified this pronouncement when it concluded that only where a city's failure to train "evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983." 489 U.S. at 389. Here, plaintiff's theory is that Hall's behavior was not an isolated incident but, rather, emblematic of a consistent and pervasive pattern of misuse of fatal force by Detroit police officers. Plaintiff asserts that the City's failure to train the officers appropriately and to discipline them when they violated policy amounted to deliberate indifference to the rights of the City's inhabitants.

> [I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a

> policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.

*Id.* at 390 (footnotes omitted). Thus, in order to prevail, plaintiff was not required to produce evidence of any deliberate or conscious choice by the Board to adopt an unconstitutional policy or custom.

In addition to administering the police department, the chief of police is responsible for training and internal discipline. The manner in which a police force is trained "is fairly attributed to a municipality when it is designed, implemented, and its trainees supervised by municipal officials to whom the municipal governing body has effectively delegated final authority so to act." *Spell* v. *McDaniel*, 824 F.2d 1380, 1390 (4th Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988). "[T]he mere fact that the governing body or some other official retains ultimate but unexercised authority over both police training policy and policymakers does not allow a municipality to disclaim the policy as its own." *Id.*

The City contends that it is not liable because the record here shows that its written deadly force policy was constitutional and because any failure to enforce that policy through appropriate training or discipline would be a departure from, rather than an implementation of, such policy. This theory was expressly rejected in *City of Canton*, 489 U.S. at 387 ("[W]e reject petitioner's contention that only unconstitutional policies are actionable under the statute.").

*III.*

*A.*

We next turn to what we consider to be the heart of this case: Was the evidence sufficient for a jury to conclude there was such a consistent and pervasive pattern of unconstitutional use of deadly force, evidencing a failure to train or discipline police officers, that it amounted to the City being deliberately indifferent to the rights of its citizens? To establish liability under a failure to train theory, "the plaintiff must prove: that the training program is inadequate to the tasks that officers must perform; that the inadequacy is the result of the city's deliberate indifference; and that the inadequacy is 'closely related to' or 'actually caused' the plaintiff's injury."

*Hill* v. *McIntyre*, 884 F.2d 271,275 (6th Cir. 1989) (citing *City of Canton*).

In reviewing the City's arguments concerning the sufficiency of the evidence, this "'court must view the evidence in the light and with all reasonable inferences most favorable to the party who secured the jury verdict.'" *Igo* v. *Coachmen Indus.*, 938 F.2d 650, 655 (6th Cir. 1991) (quoting *Portage H* v. *Bryant Petroleum Corp.*, 899 F.2d 1514, 1523 (6th Cir. 1990)). A motion for a j.n.o.v. shall be granted only when the evidence is so one-sided that there can be but one conclusion drawn from the evidence offered. *Id.* This court "must not pass on the credibility of witnesses, weigh the evidence, or substitute our judgment for that of the [factfinder]." *Agristor Leasing* v. *A. O. Smith Harvestore Prods.*, 869 F.2d 264,268 (6th Cir. 1989).

The testimony concerning the training that Detroit police officers received upon joining the force was not disputed. As of the time of trial, officer candidates at the Detroit Police Academy underwent 600 to 700 hours of training. During their time at the Academy, they were given 60 hours of firearms training and were required to take both a certification examination and an additional written examination. Plaintiff offered no evidence regarding any specific deficiencies in the initial training. Indeed, plaintiff's own expert testified that the initial training program was adequate:

> I have no problems with the training programs, I think the training programs are fine. The problem is that when you get these officers that have been on the street 10 or 12 years, they don't follow Department policy. It has nothing to do with their basic training.

(App. 769.)

The evidence further revealed that officer candidates at the Detroit Police Academy were trained extensively, both in the field and in the classroom, as to the use of fatal force. In fact, the number of compulsory instructional hours exceeded the minimum figure mandated by the state. Every graduate of the Academy was required to score 100 percent on a written fatal force policy examination, and they each received a legal manual that set forth the deadly force policy. This legal manual was updated periodically after graduation.

Moreover, Detroit police officers continued to receive training even after they graduated from the Academy and joined the force. Each officer was compelled to attend an annual refresher course concerning the use of deadly force, and officers frequently received training bulletins and updates during roll call. Forty hours of in-service training was required annually. Officers also had to qualify annually in firearms usage.

In Hall's case, his records indicate that he qualified for firearms each year from 1975 through 1982 and in 1984. There is no indication of testing in 1985, 1986, or 1987. Plaintiff argues that from Hall's records the jury could have chosen to discount the City's assurances that officers were required annually to qualify with a firearm. However, Hall's wrongful actions here stemmed not from a lack of knowledge as to *how* to use his firearm but from a lack of discretion as to *when* to use it.

In this regard, the official written rules and policies promulgated by the Board concerning the use of deadly force by Detroit police officers embraced the constitutional criteria dictated in *Tennessee* v. *Garner*, 471 U.S. 1 (1985). In *Garner*, the Supreme Court concluded that the Fourth Amendment mandated that resort to fatal force by a police officer to effect an arrest was constitutionally permissible only if the officer had probable cause to believe the suspect posed a significant threat of death or serious injury to the officer or to others. In *Pleasant* v. *Zamieski*, 895 F.2d 272, 274 (6th Cir.), *cert. denied*, 498 U.S. 851 (1990), we concluded that Detroit's written deadly force policies did not violate the Constitution.

In addition, the evidence at trial disclosed that these policies were well known to all members of the police department, including Hall. In sum, the evidence developed during the trial was simply insufficient to support the jury's finding that the City pursued an official policy or custom of failing to *train* its officers adequately in the proper use of deadly force.[3] We now turn to plaintiff's failure to discipline theory.

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**3 The case was not submitted to the jury under a failure to *supervise* theory.**

*B.*

There are three primary problems with the award of a money judgment against the City under a failure to discipline theory.

*1.* JURY PERCEPTION

First, there is the problem of the jury's perception of a case of this nature. The jury determined that plaintiff's damages were six million dollars. The liability of the police officer and the City was joint and several. The jury was not told that, under the collective bargaining agreement existing between the City and the police, the City was obligated to pay any judgment of this nature rendered against an officer.[4] Jurors would be less than human if they did not factor in a plaintiff's chances of ever directly collecting six million dollars from a police officer. In short, there is tremendous pressure to find a deep pocket if the jury believes the wrong committed was egregious, as they justifiably could have concluded here.

It is also significant that, pursuant to the Supreme Court's holding in *Monell*, there is no *respondeat superior* liability as to municipalities. 436 U.S. 658. Although a shooting looks like a garden-variety tort, a jury is, in this context, prohibited from making the master liable for the tort of the servant, unless it goes through the "custom or policy" analysis and ties in a city in that manner.

Although the Supreme Court never has suggested that we look with special care at this type of judgment rendered against a municipality, we do not decide cases in a vacuum. Particularly when we deal with sins of omission, as opposed to sins of commission, we should be certain the causal linkage is present that makes the omission the proximate cause of the wrong. To illustrate, if a city had an announced policy that deadly force could be used against fleeing felons, regardless of the circumstances, one would have little problem holding that city responsible if a person is *wrongfully* injured or killed by a police officer using deadly force. On the other hand, if a city has a proper policy and it is *not* followed, one has to speculate on the reasons why any one of that city's officers (here,

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4 In the recent case of *Lavez* v. *Holcomb*, 16 F.3d 1513 (9th Cir. 1994), the court concluded it was an error requiring reversal for the trial judge to tell the jury that the defendant police officer would be indemnified for any compensatory damages the jury might assess against him.

the 5,000 Detroit police officers) would have failed to follow the policy.

Stated another way, it is a familiar concept in the law to hold that a policy that instructs a subordinate to act in a certain manner implicates both the policy and its promulgators when the subordinate follows the policy. The reverse does not hold true, however. An order not to do something that is disobeyed opens up a whole host of plausible possibilities as to why the order may not have been followed.

*2.* NATURE OF EXPERT TESTIMONY

The second problem with the award of a money judgment in this instance stems from the nature of the "expert" testimony offered by plaintiff. There are two facets to this problem. First, we have grave concerns about the qualifications of plaintiff's witness, Frederick Postill, to opine as he did. As we have now defined the issue on appeal, Postill's testimony must have provided the basis for the jury to determine that the alleged failure of the Detroit Police Department to discipline properly officers other than Hall was the proximate cause of Hall shooting Lee Berry. As we view the record, Postill did not have the qualifications to testify as an expert on this question, and, if he did, no proper foundation was laid for his ultimate opinion.

In order not to be simply conclusory on this point, a detailed review of Postill's credentials must be undertaken. Postill received a degree in sociology in 1971, and a master's degree in education in 1976. He also took courses in criminal justice, but how many and what kind was never revealed. His law enforcement career started when he received an appointment as a deputy sheriff in 1966, a position for which, Postill admits, *no* qualifications were required. Equally important, however, is that he did not receive formal training. Postill simply started and worked with more experienced officers. The only information conveyed by the record as to what he did or learned as a deputy sheriff is the following:

> Q. All right. During your tenure as a deputy sheriff, could you tell us what types of duties you were involved in?
>
> A. Basically, general patrol, investigation work, riding a black and white, responding to calls.

Q. Were you ever certified to instruct as a deputy sheriff other members of — of the Sheriff's Department?

A. I was an instructor there in the Department. I taught defensive tactics, things of that nature.

Q. What do you mean by "defensive tactics"?

A. Physical control of subjects that you would be arresting.

(App. at 679.)

Postill also admits that he was fired twice during his two-year stint as a deputy, apparently as a result of trying to organize the deputies into a labor union against the wishes of the incumbent sheriff. Postill's disagreement with the sheriff culminated in his decision to run against the sheriff in the 1972 election. Although his election bid was successful, the electorate decided to retire him four years later. Interestingly, not one question was asked during trial to elicit what Postill did or learned during his four years as sheriff, a job for which the only necessary qualification is the ability to get elected.

Postill's testimony as to what he did after being deposed as sheriff illustrates the problem that courts and juries have with expert testimony, particularly of the type offered here. If an expert has a degree in electrical engineering, there are some assumptions that safely can be made relative to his general training, since all electrical engineers receive similar training. In this same vein, if an electrical engineer says his first job was designing generator motors, there is some notion of what that job entails. But when a sociologist cum sheriff is allowed to testify as to all manners of police practices and procedures, the slopes become slippery indeed.

Postill's next job after being sheriff was to work for four years for the Justice Department where he "developed the training criteria to train sheriffs and managers of large sheriffs[']departments . . . ." (Trial Tr. Vol. XIIa at 7.) Since up to this point in time he had had little or no training himself, exactly why he got this assignment is difficult to understand.

From 1981 to the present, Postill appears to have conducted seminars in police management techniques; taught; formed a one-

man corporation called "Criminal Justice Consultants"; testified in court; and purchased a hunting and fishing resort in Canada, where he spends five months a year. The fact that some of this would sound impressive to a jury is its vice not its virtue. The fault lies not with Postill but, rather, with the system. The courts have had a difficult time in appropriately cabining the opinion testimony of "scientific" experts. At least with scientific testimony there is some objective criteria to look to and there is some basis for evaluating a given expert's testimony against the scientific norm on the subject about which an opinion is offered. The problem that "junk science" has caused in the courtrooms has not gone unnoticed.[5] The Supreme Court recently revisited the controversy that has swirled around expert testimony for the last several years. In *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993), the Court made a number of clarifying pronouncements. These holdings, however, are in the context of scientific evidence, and thus are only of limited help in the instant case.[6] It would appear obvious, however, that evidentiary problems are exacerbated when courts must deal with the even more elusive concept of non-scientific expert testimony, as is the case here.

The distinction between scientific and non-scientific expert testimony is a critical one. By way of illustration, if one wanted to explain to a jury how a bumblebee is able to fly, an aeronautical engineer might be a helpful witness. Since flight principles have some universality, the expert could apply general principles to the case of the bumblebee. Conceivably, even if he had never seen a bumblebee, he still would be qualified to testify, as long as he was familiar with its component parts.

On the other hand, if one wanted to prove that bumblebees always take off into the wind, a beekeeper with no scientific training at all would be an acceptable expert witness *if* a proper foundation

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5 *See, e.g.*, PETER W. HUBER, GALILEO'S REVENGE, JUNK SCIENCE IN THE COURTROOM (1991); KENNETH R. FOSTER ET AL., PHANTOM RISK, SCIENTIFIC INFERENCE AND THE LAW (1993).

6 **The Court stated, relative to its holdings in *Daubert*: "Rule 702 also applies to 'technical, or other specialized knowledge.' Our discussion is limited to the scientific context because that is the nature of the expertise offered here." 113 S. Ct. at 2795 n. 8.**

were laid for his conclusions. The foundation would not relate to his formal training, but to his firsthand observations. In other words, the beekeeper does not know any more about flight principles than the jurors, but he has seen a lot more bumblebees than they have.

Carrying this example into the instant case, it is clear that Postill's testimony, if admissible at all, would have been from the viewpoint of the beekeeper, not the aeronautical engineer. If there is some formal training that would allow one to testify from a scientific standpoint on how failure to discipline officer "A" would impact on the conduct of his peer, officer "B," it is clear that Postill does not have such training. Thus, for this kind of testimony to be admissible, a foundation would have to have been laid based upon the witness's firsthand familiarity with disciplining police officers and the effect of lax discipline on the entire force. To the degree one might be tempted to argue that "everyone knows that if discipline is lax more infractions occur," this argument proves too much. If everyone knows this, then we do not need an expert because the testimony will not "assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." Fed. R. Evid. 702.

If, for example, Postill had testified that when he became sheriff there were "$x$" number of incidents involving alleged excessive force, but two years after he instituted a training program, there were "$x-y$" incidents, we would have a starting point. If he then said that after the training program was in place, he increased the regularity and severity of discipline for infractions and incidents fell to "$x-y^2$," then at least there would be some basis for his opinions. Here, however, the only discipline experience referenced was the discipline imposed *upon* Postill.

Although, as indicated, *Daubert* dealt with scientific experts, its language relative to the "gatekeeper" function of federal judges is applicable to all expert testimony offered under Rule 702. "[U]nder the Rules the trial judge must ensure that any and all . . . testimony or evidence admitted is not only relevant, but reliable." 113 S. Ct. at 2795.

In providing guidance as to how a court should carry out its gatekeeping function, the Court in *Daubert* indicated that one of the first inquiries should be whether the "theory or technique . . . can

be (and has been) tested." *Id.* at 2796. As pointed out earlier, there is no indication of any testing of Postill's discipline theory.

Second, the Court noted that "[a]nother pertinent consideration is whether the theory or technique has been subjected to peer review and publication." *Id.* at 2797. There certainly is no testimony as to any peer review of Postill's theory, and, as to publication, the record reveals the following:

> Q. Mr. Postill, what articles have you written regarding police — any aspect of police procedure or policy, whatever?
>
> A. I don't know I've written any specific articles on police procedure or policy. I've written articles and — I co-authored a textbook on jail administration.
>
> Q. You wrote a textbook on jail administration?
>
> A. That's correct.
>
> Q. Did you bring that with you today?
>
> A. No.
>
> Q. You were asked at the deposition — it was April 28th — about the articles and — and asked to supply us with copies. Did you bring any of your articles that you've written with you today in court?
>
> A. No.
>
> Q. Okay. Did you bring that alleged textbook that you wrote?
>
> * * *
>
> A. No, I didn't.

(Trial Tr. Vol. XIIa at 27.) If there were any relevant publications, the jury was left in the dark as to what they were.

The Court in *Daubert*, concludes the gatekeeper discussion by indicating that "general acceptance" still has a bearing on the inquiry.[7] Here again we know nothing about whether the discipline theory offered by Postill was other than his own.

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[7] **This language is important since the Court in *Daubert* rejects, to a large degree, the holding of *Frye* v. *United States*, 54 App. D.C. 46, 293 F. 1013 (D.C. Cir. 1923), the seminal "general acceptance" case.**

The *Daubert* Court's final observation is also pertinent here: "[T]he Rules of Evidence — especially Rule 702 — do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." 113 S. Ct. at 2799. Although *Daubert* was decided after the trial in the instant case, earlier decisions of our court have provided guidance relative to expert testimony and its admission. One admonition not followed here is that found in *United States* v. *Kozminski*, 821 F.2d 1186 (6th Cir. 1987), *aff'd in part and remanded in part*, 487 U.S. 931 (1988), relative to the proffer of an expert. Although the practice is different in some state courts, the Federal Rules of Evidence do *not* call for the proffer of an expert after he has stated his general qualifications. In *Kozminski*, this court counseled against putting some general seal of approval on an expert after he has been qualified but before any questions have been posed to him.[8] The issue with regard to expert testimony is not the qualifications of a witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question.

In *Kozminski*, the following colloquy occurred after the party offering the expert had set forth his qualifications:

> Counsel: Your Honor, we would offer Dr. Stock as an expert in the field of Forensic Psychiatry and offer his expert testimony to the jury.
>
> The Court: I don't pass on qualifications, it's up to the jury to. Go ahead and interrogate him.

*Id.* at 1219.

In the case at bar, after the qualifying questions were asked of the expert, plaintiff's attorney stated:

> MR. MATEO: Your Honor, at this point in time I would offer Mr. Frederick Postill as an expert so that he may render opinion testimony as to appropriate police policies and practices.

(Trial Tr. Vol. XIIa at 15.)

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8 Although the discussion of this issue in *Kozminski* is found in a dissent, it is not the issue on which the dissent is based. The "proffer" issue was raised by the parties in that appeal but not addressed at all by the majority in *Kozminski*.

Commenting on this type of proffer, *Kozminski* counseled:

> When the attorney conducting the direct examination of an expert witness concludes that portion of the examination relating to the expert's qualifications, it is common to so indicate to the court in language not unlike that quoted here. The person offering the expert is not seeking a ruling but, rather, signalling that the preliminaries are over and the other side may now voir dire if they desire. If the other side conducts a voir dire and then objects or just objects without a voir dire, the court must then make a ruling *if it is possible to do so*. Often it is not because the key question is not the expert's general qualifications in some field, but whether the precise question on which he will be asked to *opine* is within his field of expertise or meets some other test such as that set forth in the majority opinion. To illustrate here, the question was not Dr. Stock's qualifications—those were impeccable. The question was what he was going to be asked which would trigger an answer comprising an "expert opinion." Obviously, no ruling can be made until the expert is actually asked the question.

821 F.2d at 1219-20.

Unfortunately, the trial judge in the case at bar replied to the proffer by stating:

> THE COURT: Very well. The Court will accept the qualifications of the witness as an expert in the field of proper police policies and practices, based upon the testimony as to his background and experience in that — in that field.

(App. at 683.)

The danger in doing what the trial judge did here is that there is no such "field" as "police policies and practices." Any witness, like our hypothetical beekeeper, may be allowed to opine based on observation and experience if a proper foundation is laid. But here, there was no foundation at all for discipline testimony, even though it would fall under the general label of "police policies and practices." This term, however, is so broad as to be devoid of meaning. It is like declaring an attorney an expert in the "law." A divorce lawyer is no more qualified to opine on patent law questions than

anyone else, and it is a mistake for a trial judge to declare anyone to be generically an expert.

With all due respect to Mr. Postill, his credentials as *set forth in the record* do not qualify him to know any more about what effect claimed disciplinary shortcomings would have on the future conduct of 5,000 different police officers than does any member of the jury. Among other things, Postill's testimony assumes that all 5,000 police officers would know enough about the facts of each *claimed* event to evaluate the sufficiency of the discipline,[9] and that the officers would formulate their future course of conduct accordingly. It also assumes, without any basis in fact or logic, that police officers will be extravagant in their use of deadly force if they know discipline will not be severe if a shooting occurs. We are not talking about cheating on overtime here, or some other minor peccadillo; we are talking about the taking of the life of another person.

Additionally, Postill's methodology was as suspect as his conclusions.[10] Postill analyzed the "shots fired" reports from the Detroit Police Department for 1982 through 1987. These annual reports consist of statistical information of all shooting incidents for that year summarized in a one-page report. Postill concluded that the 636 incidents covered in the reports, involving the discharge of 1,538 shots, fired at an average distance of 30 to 35 feet from the officers' "opponents," represented a "fairly frequent" use of fatal force by Detroit police officers. Postill opined that the frequency of the incidents could not be justified by "self defense," a term listed for 502 of the incidents.

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**9 Postill did testify that police departments are a "sub-culture" (no definition given) and word gets around. There is no foundation for these conclusions either.**

**10 On Postill's direct examination, the following exchange occurred:**

> **Q. And what did you do — what conclusion can you draw from reviewing those 187 shootings instances for the period June 1982 through June 1987?**
>
> **A. Okay. First let me explain the methodology that I used. This is not what I would consider a scientific study . . . .**

**(App. 712) (emphasis added).**

Postill also testified that 277 of the 636 incidents included shootings at burglary suspects. Postill then testified that even prior to the Supreme Court's decision in *Tennessee* v. *Garner*, 471 U.S. 1 (1985), the Detroit Police Department had a policy requiting officers to exhaust all reasonable means before shooting at a burglar. Again, it should be emphasized that Postill's statistics were taken from the one-page summary sheet of shooting incidents for each year. Postill did not review the underlying facts in these cases to determine, among other things, whether the suspect was armed. Pursuant to *Garner*, fatal force may be used when an officer has reason to believe that a felon poses a danger to himself or to others.

Postill also testified concerning his review of the actual records of 161 of the 636 incidents.[11] In his opinion, 78 of these incidents were "unjustifiable" on the basis of "existing law and Detroit City policy." Postill concluded that out of these 161 incidents only 15 officers were disciplined and, in seven of these cases, the disciplinary action was held in abeyance. Postill then described 13 incidents in which he thought police officers should have been disciplined. In one of these incidents, the officer fired his weapon, accidently hitting a bystander, only after the officer already had been shot twice. Postill still felt that the officer should have been disciplined. The fact that the officer fired only after having been shot twice was not volunteered by Postill and was only revealed upon cross-examination.

After describing these 13 specific cases, Postill concluded that "the department tolerates this kind of reckless use of firearms. They either get no discipline or a slap on the wrist." It was his "opinion that their failure to direct and discipline and train their officers not to use improper deadly force constitute a pattern of

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[11] Apparently, Postill was given the records for 187 incidents selected by plaintiff's counsel. Postill testified that 26 reports did not contain enough information for him to form an opinion. These records had been provided by the City. Plaintiff's counsel stated that he just tried to select various cases where the targets were humans as opposed to animals. The City complains that there was no random sampling and therefore Postill's testimony could have been skewed. This was made clear to the jury. Regardless of the sampling, Postill was still examining the reports of 187 incidents. Any problem with the selection of those 187 incidents would have a bearing on the weight to be given the testimony, not its admissibility.

gross negligence." Postill equated "gross negligence" with "deliberate indifference" and defined it as "conscious knowledge of something and not doing anything about it."[12]

This latter testimony was particularly suspect. It was carefully couched in the precise language used in case law, either indicating a keen awareness by Postill of the direction in which he had to head, or else careful coaching prior to his testimony. "Gross negligence" is not enough to ground liability according to the Supreme Court, so Postill testified that gross negligence equates to "deliberate indifference." We apparently now have an etymology expert testifying.

We also believe this testimony was received in violation of the Federal Rules of Evidence. Although an expert's opinion may "embrace[] an ultimate issue to be decided by the trier of fact[,]" Fed. R. Evid. 704(a), the issue embraced must be a factual one. The expert can testify, if a proper foundation is laid, that the discipline in the Detroit Police Department was lax. He also could testify regarding what he believed to be the consequences of lax discipline. He may not testify, however, that the lax discipline policies

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12 **The exact exchange that occurred during direct examination is as follows:**

> **Q. With regard to the history of pattern and practices of the Detroit Police Department, do you believe the Detroit Police Department has had a past pattern and practice of condoning the use of improper deadly force?**
>
> **A. It's my opinion that their failure to direct and discipline and train their officers not to use improper deadly force constitute a pattern of gross negligence in my opinion, yes.**

**(App. 741.)**

> **Q. The phrase "deliberate indifferen[ce]" is a legal term, is that correct?**
>
> **A. That's my understanding, yes.**
>
> **Q. What does it mean?**
>
> **A. Conscious knowledge of something and not doing anything about it.**
>
> **Q. All right. Do you have any other way of describing it?**
>
> **A. Sometimes it's described as being gross negligence when you don't do something that you obviously need and must do.**

**(App. 740-41)**

of the Detroit Police Department indicated that the City was *deliberately indifferent* to the welfare of its citizens.

It would have been easy enough for the drafters of the Federal Rules of Evidence to have said that a properly qualified expert may opine on the ultimate question of liability. They did not do so. When the rules speak of an expert's testimony embracing the ultimate issue, the reference must be to stating opinions that suggest the answer to the ultimate issue or that give the jury all the information from which it can draw inferences as to the ultimate issue. We would not allow a fingerprint expert in a criminal case to opine that a defendant was guilty (a legal conclusion), even though we would allow him to opine that the defendant's fingerprint was the only one on the murder weapon (a fact). The distinction, although subtle, is nonetheless important.

Furthermore, "deliberate indifference" is a legal term, as the questioning of Postill indicated. It is the responsibility of the court, not testifying witnesses, to define legal terms. The expert's testimony in this regard invaded the province of the court. The courts have addressed this issue, and typical of their holdings is that reached in *Hygh* v. *Jacobs*, 961 F.2d 359 (2d Cir. 1992). *Jacobs* was an excessive police force case. The expert was allowed to testify that "in his opinion, the use of a baton or flashlight to strike a person in the head would constitute 'deadly physical force' that would not be 'justified under the circumstances.'" *Id.* at 361-62.

In condemning this line of testimony, the court stated: "This circuit is in accord with other circuits in requiring exclusion of expert testimony that expresses a legal conclusion." *Id.* at 363. In concluding on this issue, the court held:

> Even if a jury were not misled into adopting outright a legal conclusion proffered by an expert witness, the testimony would remain objectionable by communicating a legal standard — explicit or implicit — to the jury. Whereas an expert may be uniquely qualified by experience to assist the trier of fact, he is not qualified to compete with the judge in the function of instructing the jury. . . .
>
> * * *
>
> Far more troubling, [the expert] testified that Jacobs' conduct was not "justified under the circumstances," not

> "warranted under the circumstances," and "totally improper." We have held that an expert's testimony that a defendant was "negligent" should not have been allowed. We see no significant distinction in [the expert's] conclusory condemnations of Jacobs' actions here, which, in the language of the advisory committee, "merely [told] the jury what result to reach."

961 F.2d at 364 (citations omitted). If the rule were other than as indicated by the Second Circuit, we would soon breed a whole new category of "liability experts" whose function would be to tell the jury what result to reach — exactly what the expert did here.

*3.* FAILURE OF TESTIMONY TO SUPPORT THE JURY'S VERDICT

The third problem with the award of damages under these circumstances stems from the fact that the testimony offered does not support the jury's verdict on the failure to discipline issue, since the conduct shown does not amount to "deliberate indifference" as defined by the Supreme Court. Plaintiff asserts that his expert provided sufficient "statistical, anecdotal and expert opinion" from which a jury could find that there was a failure to discipline properly. However, the issue is not whether there may have been a failure to discipline in certain instances. In order for plaintiff to prevail, there must be sufficient evidence for the jury to conclude that the City's failure in this regard amounted to deliberate indifference to the rights of its citizens, which failure proximately caused the death of Lee Berry.

In the failure to discipline context, it is appropriate to apply the deliberate indifference standard adopted by the Supreme Court in *City of Canton* v. *Harris*, 489 U.S. 378 (1989), to require a showing of a history of widespread abuse that has been ignored by the City. *Id.* at 397 ("The lower courts that have applied the 'deliberate indifference' standard we adopt today have required a showing of a pattern of violations from which a kind of 'tacit authorization' by city policymakers can be inferred.") (O'Connor, J., concurring in part and dissenting in part); *see Wellington* v. *Daniels*, 717 F.2d 932, 936 (4th Cir. 1983).

In this regard, it should be noted that Postill included in the shootings he considered to be "unjustifiable" those that violated

Detroit Police Department policy, whether or not they violated the Constitution. The same evidence upon which Postill relied showed that in 38 of the 636 incidents the officer involved was required to attend retraining sessions and an additional 52 officers involved in the 636 incidents were disciplined. Postill based his opinion concerning the 636 incidents on nothing more than raw numbers, with no information surrounding the actual circumstances of the incidents. As for Postill's opinion concerning the 161 incidents about which he felt he had "sufficient" information to base an opinion, at best, it shows that discipline was not as frequent or as severe as *he* would have liked. It does not show a consistent pattern of ignoring constitutional violations. No other evidence, such as witnesses or even the actual police files, was offered concerning any of the incidents in which the discipline allegedly was lacking or inadequate.

Cases in which it was determined that plaintiffs produced sufficient evidence showing the existence of inadequate training or discipline, evidencing deliberate indifference on the part of the municipality, stand in stark contrast to the case at bar. In *Spell*, 824 F.2d 1380, the plaintiff's evidence consisted of seven lay citizens testifying about brutality complaints they filed that resulted in no corrective action; eight present or former officers of the city police department testifying about a "code of silence" within the department and training in inappropriate methods of subduing suspects; an assistant state district attorney who had investigated and prosecuted officers for the use of excessive force; the former legal advisor to the police department who testified that he left the department because of an attitude favoring the use of excessive force; and internal records of the city police department showing frequent complaints about excessive force that were consistently dismissed or disregarded.

In *Fiacco* v. *City of Rensselaer*, 783 F.2d 319 (2d Cir. 1986), *cert. denied*, 480 U.S. 922 (1987), the plaintiff offered evidence that the city's public safety board had adopted rules relating to police discipline, but that the police chief never had seen them. The rules required complaints to be in writing, yet did not provide a form for civilians to make a complaint. No hearings were held by the public safety board in the five years prior to the plaintiff's injury at the hands of the police. Additionally, the plaintiff called as wit-

nesses four of the six citizens who had actually lodged complaints against officers. Each citizen testified to being physically abused by an officer and complaining to the chief of police. The chief investigated the complaints on his own by simply talking to the officer involved. No investigatory file was created, no formal statement or disciplinary action was taken, and there was not even so much as a note placed in the officers' personnel files.

In *Zuchel* v. *The City and County of Denver*, 997 F.2d 730 (10th Cir. 1993), the plaintiffs' expert "supported his opinion that the training program was inadequate with specific deficiencies supported by the record." *Id.* at 739 n.4. Prior to the incident in which the plaintiffs' decedent was killed, the Denver district attorney had sent a letter to the police chief discussing the recurring incidents of the use of deadly force by Denver police officers, including five incidents over the previous six weeks where citizens were injured or killed and one in which an officer was seriously injured. The letter made numerous suggestions for improving the training in this area. The plaintiffs presented evidence that even after receiving this letter the police department made no effort to improve its training practices.

Here, the City had an acceptable training and follow-up program to communicate to its officers its constitutional policy on the use of deadly force. It had procedures in place for reviewing instances when that policy may have been violated. Over a five-year period, those reviewing procedures resulted in 38 officers being retrained and an additional 52 officers being disciplined. Plaintiff's evidence was insufficient to enable a reasonable juror to conclude that the City was deliberately indifferent to the rights of its inhabitants.

Finally, the jury never found that the alleged failure to discipline properly constituted "deliberate indifference." They never reached this conclusion because they never were asked this question. The only question on the verdict form relating to discipline reads as follows:

V

> We, the jury, on the § 1983 federal Civil Rights claim against the City of Detroit for failing to adequately dis-

cipline its police officers for the improper use of deadly force find for:

___X___ The Estate of Lee Floyd Berry, Jr.

_____ City of Detroit.

(App. 79.)

Nowhere did the jury conclude in its answers to the verdict form's written interrogatories that the failure to discipline constituted "deliberate indifference." Nor was the question of proximate cause put to the jury in any of the verdict form questions. All of this amplifies the error in allowing plaintiff's expert to testify that the failure to discipline constituted "deliberate indifference."

The jury verdict against the City of Detroit is **REVERSED**, and the case is **REMANDED** for an entry of judgment as a matter of law in favor of the City of Detroit. Fed. R. Civ. P. 50(b).

Supreme Court, U.S.
FILED
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No. 94-913

# In the Supreme Court of the United States

## October Term, 1994

**DORIS BERRY,**
**as Personal Representative of the**
**Estate of Lee F. Berry, Jr., deceased,**
*Petitioner,*

v.

**CITY OF DETROIT,**
*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether the court of appeals correctly held the petitioner's evidence was insufficient to sustain municipal liability under 42 U.S.C. §1983 based on a city policy or custom of inadequate training or discipline of its police officers on the use of deadly force that amounted to deliberate indifference on the part of the City to constitutional rights in the City?

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# In the Supreme Court of the United States

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**ON PETITION FOR A WRIT OF CERTIORARI**
**TO THE UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

---

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## OPINIONS BELOW

The opinion of the court of appeals, Pet. App. B-1 to B-21, is published at 25 F.3d 1342 (6th Cir. 1994). The decisions of the district court are not published.

## JURISDICTIONAL STATEMENT[1]

The court of appeal's judgment was entered on June 17, 1994. Pet. App. B-1. A timely petition for rehearing was denied by order entered on August 23, 1994. Pet. App. A-1. The petition was filed on October 18, 1994. This Court has jurisdiction under 28 U.S.C. 1254(1).

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[1] There is no parent or subsidiary company to be listed pursuant to Supreme Court Rule 29.

## STATUTE AND CONSTITUTIONAL AMENDMENT

The Seventh Amendment and 42 U.S.C. §1983 are set forth in the Petition. Pet. 1-2.

## STATEMENT

### A. Facts of Record

**1. Organization of Detroit's Police Department.** The City Charter established the Board of Police Commissioners who were appointed by the Mayor subject to the approval of the City Council; the Police Department operated under general rules and policies enacted by the Board of Police Commissioners and all rule and policy changes were made by that body. The Police Chief was the chief disciplinary officer and appointed Boards of Review to determine if deadly force was used due to police misconduct and to ensure the Prosecutor received a complete investigation. Homicide's special assignments squad, conducts the investigation of improper use, and makes a recommendation to the Prosecutor regardless of the Board's determination. *See infra* at page 8.

2. **The Basic Facts Covering The Shooting.** At 5:00 o'clock on June 23, 1987, Lee Berry, Jr. entered a work van with his younger brother Dwayne and nephew David and proceeded to his home. During heavy rush hour traffic he committed several traffic violations including running red lights and pulling to the wrong side of the road to make a right turn. TR IV 113-14, 116-20.

Defendant Joseph Hall (Hall), a police officer on duty, observed the violations and followed the van on his motorcycle to 3810 West Outer Drive. An altercation followed in which Hall shot and mortally wounded Berry. Berry was not under the influence of drugs or alcohol. Hall had never been involved in a fatal shooting. TR I 29-30, TR IV 68, TR IXa 21, 28, TR XA 8, 38.

Officer Joseph Hall joined the Police Department in 1962; he attended annual weapons qualifications in 1975-77 and 1979-84. The officer responsible for training and support at the Detroit Police Academy testified that Hall passed the fatal force exam because he would not have otherwise been state certified or passed the academy, and he was so certified. Hall also testified that he had received firearms and deadly force policy training at the Academy, during annual qualifying sessions, through written updates and at daily roll call reviews. Hall was aware that he was not permitted to carry hollow point bullets and that the deadly force policy would not have permitted him to use deadly force while arresting Berry for a misdemeanor. TR VIIIa 9-20, 61-68, TR IXa 40, TR XIX 47, TR XX 5, TR VIIa 9-20.

Officer Hall testified that he followed Berry's van and activated his siren and lights; the van was dipping into the wrong lane and was traveling 60-70 mph in a 30 mph zone. Upon arriving at the Berry home Hall blocked the driveway with his cycle; he drew his gun because of the highspeed chase and his fear that Berry was armed. When Hall reached for his cuffs, Berry spun around and struck Hall's chest. Hall then hit Berry's rib cage, struck his head with his gun, and knocked him to the ground. As Hall retreated towards the street, he turned after hearing the children tell Berry to leave the officer alone. Berry then hit Hall, broke his glasses, forcing glass into his face and knocking Hall either to his knees (as indicated by his deposition) or almost on his knees (as indicated at trial). Hall testified that Berry was close when he fired the weapon. Hall fired his gun because Berry had attacked him twice and he felt he was going to die. TR Xa 17, 27-28, 65-68, TR IXa 6-8, 10-13, 25, 29, 31, 35-36, 48-52, 54-58, 89, TR VIIIa 86.

A forensic chemist concluded that the gun was fired from probably three but possibly 10 feet, from Berry's hands. Berry could have had his hands close to a fired gun, reached for a gun, or touched its barrel or Hall's hands. TR VIIIb 4, 10-11, 13-16, 23-24, 30, 33. An evidence technician, concluded that the bullet holes would not have been as high if a 5'10 inch person had fired while holding a gun straight. Berry's skinned knuckles

suggested punching or fighting. An expert firearms examiner testified that there was no evidence of a close range firing and the distance of the gun's muzzle to the clothing could have been 4 to 6 feet. TR VII 47, 51, 53, 55-56, 58, 123, 133, 139-40, 146, TR VI 155. The medical examiner who performed the autopsy concluded that a struggle occurred and that Hall's report was inconsistent with the forensic evidence. TR IV 13, 103-06, 165.

3. **Testimony of Plaintiff's Expert.** Frederick Postill, a former sheriff and trainer of police operations, testified he performed training, and consulting work with police, corrections and security operations but he did not specify the type of training that was provided. TR XIIa 28-29. Although Postill had completed two thirds of the program at Michigan State University School of Criminal Justice towards a doctorate degree, the record did not specify the focus of program he was completing and he had never graduated from any university with a degree in criminal justice. TR XIIA 4, 31-32

Postill was a deputy sheriff from 1966 to 1968; he was fired twice during the two years he was a deputy sheriff. Postill's duties as deputy sheriff included general patrol, investigation work, riding a black and white, and responding to calls. TR XIIA 16, TR XIIa-5. Postill was elected as sheriff in 1972, took office in January, 1973 and left that position in January 1977. TR XIIa-6. No police background or training was needed to run for the position of sheriff. TR XIIa 16. While in the position of sheriff, Postill did not receive training at any academy. TR XII 15. The second time he ran for the sheriff position he lost. TR XIIa 17. Postill never took any exams administered by the State of Michigan when he was a deputy sheriff and did not need to be certified by the State of Michigan when he was elected Sheriff. TR XIIa 25. He had not received formal police training on the proper use of firearms. TR XIIa 26. Postill had a total police experience of three years and six months experience as a full time officer. TR XIII 13, 25.

Postill's testimony indicated that Detroit had about 5,000 sworn police officers as of 1987. J.A. 768. *Accord: NAACP Detroit Police Officers Ass'n.*, 591 F.Supp. 1194, 1197 (E.D. Mich. 1984). Postill believed officers should not use deadly force unless techniques like impact weapons were exhausted first. TR XIIa 53, 102-03, TR XIII 56-58.

Postill testified (apparently based upon the representations of the attorney for the plaintiff) that there were 636 shooting reports over a five (5) year period. Plaintiff's counsel had provided Postill with reports concerning 187 out of the 636 shots fired by police weapons from 1982 to 1987. Of those 636 shooting reports, the 187 reports selected by the plaintiff's lawyer involved a shooting at a person, rather than a dog or other object. J.A. 761-762. There was no testimony of the method by which the 187 were chosen and when Postill did the study he was unaware that records of the remaining 449 shootings existed. Postill testified that 15 officers were disciplined out of the 187 shots fired he reviewed; only one of these 15 cases involved a fatality. TR XIIa 68, TR XIII 68, 92, 94, 111-12, 114, 128-29.

Postill then described 13 shootings over a five year period (1983 through 1987) in which either he believed there should have been a sanction imposed, but was not, or where there was a sanction imposed which in his view was inadequate sanction. Thus, over the five year period, there were an average of three (3) incidents a year in which Postill believed that the discipline was inadequate. He offered no statistics or other views as to why the thirteen (13) incidents over a five year period constituted a policy or custom, nor did he offer reasons supporting his conclusion that the punishment should have been more severe.

Nine (9) of the 13 shootings he described took place before the March, 1985 decision of the Supreme Court in *Tennessee v. Garner*, 471 U.S. 1 (1985) and ten (10) before the formal change in City policy in 1986 to incorporate that decision into its policies. When describing the facts of these cases, Postill

did not discuss whether the officer who fired shots at a distance had reason to believe that the suspect was armed or otherwise posed a danger.

None of the underlying police records of the incident was offered or admitted into evidence.

No discipline resulted in the following cases: on 6/13/87 Officer EG was wounded twice by a citizen before he fired a shot which killed a bystander; on 2/18/86 Officer M.S. fatally shot an unarmed burglary suspect from 25 feet; on 12/1/86 Officer R.D. shot at an unarmed burglary suspect from 60 feet; on 11/13/86 Officer C.B. shot at an unarmed larceny suspect; on 5/22/85 Officer G.D. fired shots after observing an unarmed person on a roof; on 1/6/84 Officer J.J. barricaded himself in a garage and fired shots from a shotgun; on 9/19/84 shots were fired when Officer R.W. had a dispute with another officer; and on 7/6/83 Officer T.W. shot at a car after a woman indicated a suspect was leaving with a television.

Discipline was recommended but none was taken in the following cases: on 1/23/85 Officer M.C. fired six shots during an attempted burglary; on 12/29/85 Officer M.S. accidently shot her son while demonstrating her weapon; on 11/8/85 Officer J.G. shot at a possible burglary suspect; and on 2/28/85 Officer D.R. shot at the floor twice while in a domestic fight. On 8/18/85 Officer D.A. fired shots and threatened to get his gun; he received a 5 day suspension held in abeyance. TR XIIa 73-79, TR XIII 71, 115-16.

Postill reviewed some of the 1983-1987 "shots fired" investigative reports made concerning discharges of officer's guns; 502 out of 636 shooting incidents were justified as "self defense." He did not define the term, and his testimony did not appear to take into account the fact that Detroit's fatal force policy linked self-defense and defense of others together. Def. Exh. 308. Given the shooting distance and crimes, he believed that self-defense was not possible that frequently. Postill testified that the 277 rounds shot at burglary suspects was improper under

Detroit's policy and the law and no discharges for on duty shootings occurred in 1983-87. Because most officers involved in the shootings were seasoned veterans with 10-12 years of experience, Postill concluded they were adequately trained, but that the Department tolerated the reckless use of firearms. TR XIIa 63, 67, 81-82, TR XIII at 127.

Postill equated "deliberate indifference" by which he meant "conscious knowledge of something and not doing anything about it" with "gross negligence"; and testified with regard to the Detroit Police Department that: "It's my opinion that this failure to direct and discipline and train their officers not to use improper deadly force constitute a pattern of gross negligence." TR XIIa 115-16, Pet. B-19 n.12. Postill did not compare the adequacy of Detroit's training and discipline concerning use of deadly force with the practices of other departments. He acknowledged that his study was not "scientific." He gave his view that Detroit's training programs concerning the act of deadly force were fine, but that the problem arose because many experienced officers "don't follow Department policy." TR XIIa 66, 69, TR XIII 127.

**4. Deadly Force Policy, Training, And Discipline.**

Detroit's fatal force policy was updated after *Tennessee v. Garner*, 471 U.S. 1 (1985); it authorized officers to use fatal force in self-defense or in defense of someone else only if the threat of injury was immediate and life threatening. Pursuant to the policy, police were taught that deadly force should be used only as a last resort. TR XIIb 34, 64, 73-75; Ex. D-308.

The State of Michigan required certified Michigan law enforcement officers to complete 440 training hours and a certification examination. The Detroit Academy required 600 to 700 training hours and an additional exam. Officers in Detroit initially took a 60 hour firearms training course for weapon proficiency and were required to score 100% on a written fatal force policy examination; thereafter they took annual refresher courses when they qualified for firearms. The fatal force policy was reinforced through roll calls, video tapes, and handouts;

annual weapon qualifications assured officers had weapon proficiency and were aware of the limitations on their use. TR XVIIIa 7-8, 27-28, 48, 96-97, TR XIXa 4-5, 46, TR XX 4-5, 48.

Officers were disciplined for intentional violations of the fatal force policy, but officers who justifiably used fatal force in self-defense were not disciplined because they were expected to protect themselves and citizens. Testimony for the City disclosed there was no department custom of not providing discipline or training on firearms use or of discharging guns with impunity. TR XXIb 19-21, 27, XVIIIa 60-68.

From 1982 through 1987 the Detroit Police Department ordered 38 officers to be retrained and 52 to be disciplined for improper use of deadly force. TR XVIIIa 70-71.

**B. Trial And Post Trial Proceedings**

Detroit objected to the introduction of Postill's testimony. TR XB 4-5, TR XIIa 35. Detroit moved for a directed verdict because, among other things, plaintiff had not met its burden of proving that any failure by the City was the moving force of Hall's conduct, plaintiff's evidence was insufficient because the sample of 187 shootings was incomplete, and the testimony did not show if City policymakers were aware of inadequacies in discipline or that they made a deliberate choice of not enforcing their deadly force policy. TR XXIa 3-8, 29-32. The Court deferred ruling on the matter.

The jury awarded six million dollars in compensatory damages. Thereafter, the Court denied Defendants motions for directed verdict and entered judgment against the City and Hall for six million dollars plus statutory interest. TR XXIV 7, R. 352. The City and Hall moved for a new trial and/or judgment notwithstanding the verdict. R. 354. These motions were denied. R. 375. In its Rule 50(b) motion for judgment as a matter of law, the City argued it was entitled to judgement because the plaintiff failed to offer evidence that any failure to

train or discipline was a custom or policy of the City. Detroit and Hall filed timely appeals and while the appeals were pending, the parties settled Hall's appeal. R. 377. As a result, the City's obligation under the judgment was reduced to $2,500,000, and the issue was limited to the City's liability.

On appeal, the City argued the evidence was insufficient to sustain a judgment of municipal liability against the City under 42 U.S.C. §1983, and particularly that: "Postill's Testimony Is Not a Sufficient Basis for Imposition of Municipal Liability under 42 U.S.C. 1983," "Postill's Review of the Files Was not a Study of the Type Reasonably Relied upon by Experts," and that "Postill's Study Was Not Based upon Evidence of Record, and was Based upon an Error of Law, which Equated Violations of Detroit Policy with Violations of Constitutional Rights." Appellant's Brief at 40-41.

**C. The Decision of The Sixth Circuit**

Detroit appealed on the ground that the evidence, read most favorably to the plaintiff, was not sufficient to show that any policy or custom of the City caused a violation of the constitutional rights of Berry.

In its June 17, 1994 decision, the court of appeals reversed the judgment against the City after holding "that the plaintiff's evidence "was insufficient to prove deliberate indifference on the part of the City such as to give rise to municipal liability under 42 U.S.C. §1983." App. B-1. In reaching its decision, the court recognized that the evidence had to be viewed in the light most favorable to the petitioner with all reasonable inferences being viewed in her favor, and expressly noted that the court "'must not pass on the credibility of witnesses, weigh the evidence, or substitute our judgment for that of the [factfinder].'" App. B-7.

On the failure to train issue, the court found that petitioner had offered no evidence regarding any specific deficiencies in the initial training, and noted that the plaintiff's

expert had testified that the initial training program was adequate. App. B-7. The court concluded that Detroit's formal deadly force policy was well known to all members of the police department, including Hall." App. B-8.

On the failure to discipline issue, the court held that the testimony offered did not support the jury's verdict. App. B-21. The court ruled that the expert testimony of Postill was received in violation of Rule 704(a) of the Federal Rules of Evidence. As for Postill's opinion concerning the 161 incidents about which he felt he had "sufficient" information to base an opinion, the court ruled that "at best, it shows that discipline was not as frequent or as severe as he would have liked. It does not show a consistent pattern of ignoring constitutional violations. *No other evidence, such as witnesses or even the actual police files, was offered concerning any of the incidents in which the discipline allegedly was lacking or inadequate.*" App. B-22.

## ARGUMENT

Petitioner claims her Seventh Amendment right to trial by jury was violated when the court of appeals incorrectly concluded the evidence was insufficient to go to the jury "[s]ince petitioner clearly presented more than sufficient proofs on the issue of the City of Detroit's failure to train and discipline its police officers." Pet. 16. Petitioner's argument, which is couched as a constitutional violation, is nothing more than an argument based on the sufficiency of the evidence. For if the evidence was insufficient there is no violation of the Seventh Amendment because trial and appellate judges withdrew cases from juries at common law, just as they do now. And the Seventh Amendment expressly incorporates "the rules at common law" for reexamination of factual issues. *See* U.S. Const. Amend. VIII, Pet. 1-2, and *Dimick v. Scheidt*, 293 U.S. 474 (1935).[2]

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[2]Both *Globe Liquor Co. v. San Roman*, 332 U.S. 571 (1947) and *Cone v. West Virginia Paper Co.*, 330 U.S. 212 (1947)

No conflict between the circuits is alleged or shown, nor is there any conflict between the decision below and a decision of this Court. Indeed, Petitioner does not identify any statement of the law by the court below as erroneous, and her argument that there was sufficient evidence to support liability under 42 U.S.C. §1983 is based entirely upon the record in this case and is incorrect. The petition raises no legal issue of general application or importance and should be denied.

1. Petitioner's expert conceded that the training programs of Detroit were "fine". TRXIII 127. The uncontradicted record reflected that Detroit police officers received extensive training on deadly force upon joining the force and thereafter received annual updates, training bulletins, and training at daily roll calls. Plaintiff's evidence of the inadequacies of training consisted wholly of Postill's expert testimony. The court of appeals properly viewed the "evidence in the light and with all reasonable inferences most favorable" to the petitioner, and nevertheless found that the district court erred in permitting the jury to impose judgment on the basis of such evidence. Pet. B 7-8. In so ruling the court of appeals decision was consistent with the decisions of this Court and other circuit courts.[3]

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involved a court of appeals directing or setting aside the district court's judgment in the absence of a timely motion for jnov. Here, the City submitted a timely motion for jnov in the district court which gave the court of appeals a sufficient basis for overturning the judgment as a matter of law and remanding the case for an entry of judgment in its favor.

[3]Without providing citation to the record, Petitioner asserts the evidence went far beyond the anecdotal showings made in *Spell v. McDaniel*, 824 F.2d 1380 (4th Cir. 1987), and *Zuchel v. City and County of Denver*, 997 F.2d 730 (10th Cir. 1993) because Petitioner documented case after case of undisciplined improper use of deadly

2. Petitioner argues that the primary reason why this Court should grant certiorari is because it has never ruled on the failure to discipline issue. Pet. 22. Yet, Petitioner has not identified, nor has she argued, that the Sixth Circuit's decision is in conflict with the decision of another United States court of appeals on the same matter, or that the Sixth Circuit has departed from the accepted and usual course of judicial proceedings. Supreme Court Rule 10.1 (a); *Braxton v. United States*, __ U.S. __, 111 S.Ct. 1854, 1857 (1991).

In holding that Petitioner's expert testimony was insufficient to prove that the City's failure to impose adequate

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force. Pet. 25.

The Sixth Circuit correctly noted that the decisions relied upon by Petitioner did not support a finding of liability against a municipality under 42 U.S.C. § 1983. App. B-22, 23. In *Spell v. McDaniel*, 824 F.2d 1380 (4th Cir. 1987), the Fourth Circuit had before it plaintiff's undisputed evidence regarding inadequate training including testimony of internal police department records, seven lay citizens of the City, eight present or former officers of the City police department, an assistant district attorney, and a former legal advisor to the police department.

In *Zuchel v. City and County of Denver*, 997 F.2d 730 (10th Cir. 1993) the expert, among other things, had over 16 years of experience as a New York City police officer. As his doctoral research, the expert had analyzed New York City police shooting incidents during a four year period, and as a senior fellow at the Ford Foundation he had projects which helped police avoid the use of deadly force. There was testimony that the Police Chief, who was apparently Denver's policy maker, was informed by the district attorney of the need for more training, and there was evidence of six police shootings within a six-week period but Denver took no action. In *Zuchel*, unlike this case, the expert did not acknowledge that training was fine, but "the expert supported his opinion that the training program was inadequate with specific deficiencies supported by the record." *Id.* at 738, 739 n.4. *See also* footnote 4 below for a discussion of *Fiaco v. Rensselaer, N.Y.*

discipline amounted to deliberate indifference to the rights of its citizens, which failure proximately caused the death of Berry, the Sixth Circuit applied the deliberate indifference standard adopted by this Court in *City of Canton v. Harris*, 489 U.S. 378, 379 (1989) and found it required a showing of a history of widespread abuse that has been ignored by the City. Pet. B-21. Petitioner does not take issue with that standard of law and we submit that it is correct.

Petitioner makes arguments related to the alleged error the court of appeals made when it examined the qualifications of her expert, Postill. *See, e.g.*, Pet. 20- 22. These arguments ignore the fact that the court examined not only the qualifications of her expert, but also his testimony. Pet. B-22. The court's ruling on the deficiencies in Postill's testimony and the lack of record evidence demonstrating a pattern by the City of ignoring constitutional violations, provides an ample basis for the decision below. An examination of Postill's testimony demonstrates that there was no error.

Postill's opinion was taken from PX 154 which was a "one-page summary sheet" of "shots fired investigative reports" which was never offered into evidence. Pet. B-18, TR XIIa 43-44. The other records Postill reviewed (PX 220) were not offered into evidence. As a result, neither the trial court nor jury could determine from the evidence whether his opinion was reasonably based upon the underlying facts. Postill's analysis of shooting incidents, did not review the underlying facts of each incident as demonstrated by the fact that at least five incidents he viewed as unjustified were fleeing felon shootings that were authorized under Michigan law and which occurred before this Court's 1985 decision in *Tennessee v. Garner*, 471 U.S. 1, 16 (1985) changed the deadly force standard. TR XXIIa 54-83, TR XIII 110-116.

In addition, Postill considered shootings to be "bad" and to require discipline if they violated any department policy even though Detroit's deadly force policy, which allowed deadly force only for "life threatening" circumstances imposed more severe

limitations on the use of force by police officers than the Constitution. *Graham v. Connor*, 490 U.S. 386, 396 (1989)(allowing deadly force if there is any immediate threat to the safety of officers or others); DX 308.

Postill's testimony as to how many shootings were "bad" had no probative force in showing "deliberate indifference to constitutional rights," without a demonstration that the shootings were constitutional violations. From Postill's testimony, it was impossible for a jury to determine which, if any, alleged "bad" shootings were violations of Detroit policy, but not violations of the Constitution, and which alleged "bad" shootings were violations of constitutional rights at the time of the shootings. Indeed, as the court noted Postill included in his study an incident where an officer did not shoot until he was wounded twice. App. B-18. Postill's failure to confine his review to shootings which violated constitutional rights meant that his testimony could not establish liability against the City for an asserted policy or custom of deliberate indifference to rights of persons under the Constitution.

Moreover, Postill's testimony failed to offer rational support for his view that more imposing sanctions, or more severe sanctions, to 13 of Detroit's 5,000 police officers over a five year period, would have changed the behavior of the police force. For it is only where the "inadequacy [is] so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *City of Canton v. Harris*, 489 U.S. 389, 390 (1989). *Accord: Jett v. Dallas ISD*, 491 U.S. 701 (1989) and *St. Louis v. Propotnik*, 485 U.S. 112 (1987).

When the Sixth Circuit's decision in *Berry*, is compared to the discipline case cited by Petitioner, it is evident that it does not conflict with that decision.[4]

Petitioner also failed to offer evidence showing that any City Official, City policy maker, or the Police Chief, made a "deliberate choice to follow" a practice or custom of inadequate discipline and that the asserted inadequacies arose from such policy. The official policy makers of Detroit were in fact, the Board of Police Commissioners; and while the Police Chief had control over disciplinary matters, he had no authority to make

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[4] In *Fiaco v. Rensselaer, N.Y.*, 783 F.2d 319, 331 (2nd Cir. 1986), "[n]o officer was reprimanded, suspended, discharged or demoted" by the municipality and procedures for the consideration of charges against police officers had never been implemented.

Petitioner also asserts that an experts use of "gross negligence" was found permissible in *Parker v. Williams*, 855 F 2d 763, 777 (11th Cir. 1988) in which the Eleventh Circuit upheld a jury verdict holding a county and sheriff liable under 42 U.S.C. 1983. Id. at 778. However, *Parker* was rendered before this Court rejected the gross negligence standard in *Canton v. Harris*, 489 U.S. 389, 388-89, 391-92 (1989). Moreover, *Parker*, 855 F.2d at 763 was withdrawn by the Eleventh Circuit and a new opinion substituted which reversed the finding of liability under Section 1983. See *Parker v. Williams*, 862 F.2d 1471 (11th Cir. 1989).

policy changes.[5] *City of Canton v. Harris, supra,* 389 U.S. at 389; *Pembaur v. Cincinnati*, 475 U.S. 469, 483-484 (1986).

In discussing the insufficient evidence of a pattern of ignoring constitutional violations, the court correctly noted that the uncontradicted evidence showed that the Police Department disciplined 52 police officers for violations of its deadly force policy, and required further "retraining" for an additional 38 officers over a five year period. Pet. B-22, TR XVIIIa 70-71. In this case, there was no "widespread practice that...is 'so permanent and well settled as to constitute a "custom or usage with the force of law.'" *St. Louis v. Propotnik,* 485 U.S. 112, 127 (1987); citing and quoting from *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 167-168 (1970); *Jett v. Dallas ISD,* 701, 736-37 (1989). Plaintiff's evidence simply failed to show a City custom of inadequate discipline. As a result the Sixth Circuit correctly held that evidence in this case is insufficient to impose municipal liability under 42 U.S.C. §1983. *Canton v. Harris,* 489 U.S. 389 (1989).

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[5]While not commenting on a theory of inadequate discipline, this Court has expressed its reservations about extending liability in a way which would involve the courts in extensive second guessing of the conduct of municipal officials, which would raise "serious questions of federalism." *Canton v. Harris, supra,* 489 U.S. at 392. Other courts of appeals have ruled, correctly in our view, that behavior of the Chief of Police of ignoring or departing from the City policy established by a higher policy making body, is insufficient to impose municipal liability under 42 U.S.C. §1983 unless the evidence shows that policy making body of the City made a deliberate choice to follow or acquiesce in a policy or custom which causes violations of constitutional rights. *Gonzalez v. Ysleta I.S.D.,* 996 F.2d 745 (5th Cir. 1993); *Auriemma v. Rice,* 957 F.2d 397 (7th Cir. 1992).

3. On appeal, the City argued that the evidence failed to show any policy or widespread custom by the City of inadequate training or inadequate discipline and that Postill's testimony did not fill that need because it was not based upon the evidence of record and was based upon an error of law. In our view the City properly and timely raised the issues decided by the court of appeals. In any event, this Court has held that "a court may consider an issue 'antecedent to ... and ultimately dispositive of' the dispute before it, even an issue the parties fail to identify and brief." *U.S. Nat. Bank of Or. v. Independent Ins. Agents*, 113 S.Ct. 2173, 2178 (1993), *citing, Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77, 111 S.Ct. 415, 418 (1990).

## CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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